STATE AID TO PRIVATE INSTITUTIONS OF HIGHER EDUCATION--THE DEVELOPMENT OF GUIDELINES

BY

LEONARD A. RHINE

A DISSERTATION PRESENTED TO THE GRADUATE COUNCIL
OF THE UNIVERSITY OF FLORIDA IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

UNIVERSITY OF FLORIDA

1983

This research project is dedicated
to my father, Moe Rhine,
who has an unswerving faith in higher education.

ACKNOWLEDGEMENTS

I must give thanks to the members of my supervisory committee, Dr. Kern Alexander and Dr. William Hedges, and especially to my chairman, Dr. James L. Wattenbarger. This research would not have been completed without his patience and support during my periods of lesser and greater intensity.

Thanks must be given to the Turner Broadcasting System for the broadcasting of the Atlanta Braves and Hawks games, the T.V. news programs of Nightline and Cable News Network and my stereo. All of these created the necessary background for my work. The University of Florida was supportive in granting a nine-month sabbatical which allowed me to complete my coursework and gather my research.

The support of my old friend, Sam Bacharach, must be noted. During many long-distance calls, Sam told me how he would motivate me if he were my chairman. Thanks to Jill S. Louv and Dwight Rogers for going through the process before I did. Finally, the research would not have been completed without the support and patience of my wife, Helene, who was asleep during most of my late night writing. Special mention must be made of my daughter, Jamie, who definitely was a distraction but a valuable and enjoyable one, without whom this dissertation would have been completed sooner.

TABLE OF CONTENTS

Abstract of Dissertation Presented to the Graduate Council
of the University of Florida in Partial Fulfillment of the
Requirements for the Degree of Doctor of Philosophy

STATE AID TO PRIVATE INSTITUTIONS OF HIGHER EDUCATION--THE DEVELOPMENT OF GUIDELINES

By

Leonard A. Rhine

April 1983

Chairman: James L. Wattenbarger

Major Department: Educational Administration and Supervision

The objective of the research was to develop guidelines that would determine the appropriateness and legality of state aid to private colleges and universities. Florida's Tuition Voucher Fund Legislation was used to illustrate the applicability of the guidelines to state law.

Federal Supreme Court decisions have established a distinction between aid to sectarian primary and secondary schools and aid to institutions of higher learning. The educational experience on the lower level is defined as pervasively sectarian with such programs as the support for repair and maintenance of schools; reimbursements for mandated services and tuition; and deductions from income tax being unconstitutional aid.

Other Supreme Court decisions have resulted in the development of the three-tiered test which defines what types of governmental aid to sectarian colleges are permissible. A governmental program must neither

advance nor inhibit religion; have a secular legislative purpose; nor foster excessive governmental entanglement. Many tuition grant and facilities building programs have passed the test.

Related state-level decisions have incorporated the concepts developed on the higher level. Other state-level cases involve state constitutional restrictions which often are more strict than federal requirements. The constitutions of several states have been amended to permit governmental aid to private colleges.

The guidelines for governmental aid to private colleges are: a statute must have a primary effect of neither advancing nor inhibiting religion; must have a secular legislative purpose; must not foster excessive governmental entanglement with religion; must comply with state constitutional regulations; and must contain a non-discrimination clause; the participating colleges must be accredited.

Florida's Tuition Voucher Fund was initiated in 1978. The statute incorporates five of the six developed guidelines lacking only a non-discrimination clause.

In using Florida's program to illustrate the usefulness of the guidelines, the possibility of wider applicability can be noted. Usage of these guidelines would result in a constitutionally valid and appropriate program.

CHAPTER ONE
INTRODUCTION AND METHODOLOGY

Background

American private colleges and universities are defined as a diverse, unique and heterogeneous group. Of the 2827 colleges and universities included in the 1970 listing by the Carnegie Commission on Higher Education, 1,514 were classified as private. Although the four year liberal arts college dominated, this group did include a number of doctoral degree granting institutions, comprehensive colleges and universities and two-year colleges. In 1976, 786 private institutions noted religious affiliation with nearly two thirds being Protestant. Geographic distribution was uneven with eight states (California, Illinois, Massachusetts, Michigan, Missouri, New York, Ohio and Pennsylvania) accounting for 50% of the schools.

Between 1950 and 1975, the public sector witnessed a 65% increase in the number of colleges and universities with most of the growth in the two year sector. In terms of student population, the private colleges also demonstrated solid growth. The number of students attending private higher education doubled during this expansionist era increasing from 1,140,000 to 2,390,000 students. However as a result of the sixfold growth of the public sector, the private group's percentage of the total student body decreased from 50 to 24%

(Breneman and Finn, 1978). The size of institutions has changed substantially. In 1397-38, colleges under 500 students comprised 48% of the institutions and enrolled 18% of the students. In 1972, 27% of the colleges had such small student bodies and these schools accounted for 2% of the students (Ford, L., 1972).

Two basic arguments are made in relation to the need for the continued existence of and public support to the private colleges and universities. One argument is economic and relates to issues ranging from duplication of resources to enrollment projections. The second argument is of a more philosophical nature. As Breneman and Finn note, "Supporters of private higher education . . . maintain that private institutions contribute in important and unique ways to the diversity, independence, quality, efficiency and innovation within U.S. higher education" (Breneman and Finn, 1978, p. 6). A 1977 report of the Carnegie Council on Policy Studies in Higher Education elaborates more specifically on these concepts. The commission valued the private sector for the following reasons:

1. independence of governance
2. diversity
3. long standing traditions that are meaningful to students and alumni
4. competition with the public sector
5. devotion to liberal learning
6. standards of academic freedom
7. contribution of a high proportion of the institutions with the academically ablest students and faculty members.

8. contribution to the cultural life of many small towns, rural areas and urban sectors.

9. provision of wide access for students by income group and by minority status. (Carnegie Council on Policy Studies in Higher Education, 1977)

Arguments for the continued existence of the private sector may not be as quantitative as some of the economic aspects but they do carry the persuasions of logic and rationality.

The economic argument is based on a number of problems including economic plight of the private institutions, declining and shifting student population, the present and future level of state and federal aid to the private schools and the future economic prognosis for this sector of higher education.

The late 1960's and the 1970's were an era of financial constriction for the whole higher education industry. Inflation, increased operating costs and the leveling off of enrollments caused retrenchment in both the public and private sectors. At many institutions, salaries for both faculty and general staff did not keep pace with the consumer price index. For the 1970-75 period, faculty salaries lagged behind the CPI by an average of 1% per year. Hiring freezes, deferment of maintenance and, for the private colleges, the use of capital reserves became commonplace. Institutions with high fixed costs because of tenured faculty and plant expenses noted a sharp increase in unit costs. These institutions were especially vulnerable if they also suffered from enrollment declines (Folger, 1977). The admission of large numbers of disadvantaged students drained resources through financial assistance and compensatory programs. The growth

of expensive graduate and professional programs further diluted funds at some institutions (Ford, L., 1972). In a 1976-77 survey of private colleges, Bowen and Minter noted that 34% of the private sector felt that they had lost ground financially during the past year (Bowen & Minter, 1977).

Although the overall economic picture for both the private and public sector appears bleak, the cases of individual institutions vary. The type of private institution and the specific financial base directly influence the potential ability of the college to survive. A number of variables must be analyzed in order to comprehend the financial stability of an institution. The negative alteration of any of the specific variables often has a more traumatic effect on a private college than a publically supported institution.

Critical economic factors are those which "affect the relationships between revenue and expense, such as enrollments, share of the total student market and differences in cost behavior" (Lewis, 1980, p. 67). In terms of economic/financial analysis, Lewis divides higher education into three distinct sectors:

1. tax supported or public subsidized sector
2. heavily endowed independent sector or the private subsidized sector
3. under endowed independent sector or the private non-subsidized sector.

The first two sectors have more in common than the latter private non-subsidized group which reacts differently to economic stimuli. An example of the dissimilar reaction by varying sectors is the response

to the need for increased revenue. Generally, the tax-supported sector relies on tuition for 25% of its revenue while the under-endowed, independent sector relies on tuition for 79% of its revenue. An increase of $500 in per unit costs would result in an increase of tuition by $125 at a tax supported, public college and an increase in tuition of $350 at a non-subsidized, private institution (Lewis, 1980).

Since the non-subsidized sector relies heavily on tuition, this sector will be most adversely affected by declines in enrollments. For the private, subsidized sector, endowments provide a similar subsidy as state taxes for the public institution. Elite private colleges attract two clientele; wealthy students and honor students with financial need. The low-income student is financed by the institution and federal and state aid programs.

In analyzing cost factors for colleges, Lewis notes two critical fixed-variable/cost ratios:

1. the ratio of fixed costs to variable costs decreases as the size of the institution increases
2. the overexpansion of physical plans and the decrease of private college enrollments since 1968 have resulted in a high ratio of fixed to variable costs in the private sector.

A small college with 1000 students may have a 70% fixed to 30% variable costs ratio while a large university with 20,000 students may have a 40% fixed to 60% variable costs ratio. The function of this economic factor is based on size, not whether the institution is private or public. The private,

non-subsidized sector has a large number of institutions of the smaller size and will be disproportionately affected by the predicted student population decrease. According to Lewis, this phenomenon points to the demise of the under-endowed, independent sector (Lewis, 1980).

Besides different reactions to increased costs, the various institutions have considerable cost per student range. Universities involved in graduate and professional study generally have higher costs per student than four-year colleges and community colleges. Institutions concentrating on the natural sciences, technology or medicine have higher costs than those emphasizing humanities and social sciences. As previously mentioned, cost differentials can be related to size and also urban or rural setting or section of the country. Nevertheless, Bowen notes that "differences in expenditure remain even when only educational costs are considered and when the institutions being compared seem to have similar missions, location and size and to be rendering services of a similar quality" (Bowen, 1981, p. 21).

In the public sector, research and doctoral universities costs per student for 1976-77 had a median of $2,020 per student with a minimum of $1,076 and a maximum of $4,786. Private institutions of this type had a median per student cost of $3,341 with a minimum of $1,517 and a maximum of $8,039. Private liberal arts colleges noted a median per student cost of $2,242 with a minimum of $1,134 and a maximum of $4,249. Overall, the median private sector per student cost was noted at $2,183 with the public institution's median being $2,020. Bowen reflects on the apparent unexplainable variance by stating that "costs in the 3,000 American colleges and universities were determined by a vast, complicated and decentralized philanthropic

lottery rather than by rational decisions based on the economic allocation of resources" (Bowen, 1981, p. 22).

A number of the private institutions have attempted to compensate for the economic difficulties by broadening the scope of the student body and increasing emphasis on the recruitment of students. In many cases, the private colleges have begun to compete for the same potential student population as the public sector. In attempting to increase the enrollment, colleges must distinguish between external environmental factors which are largely beyond their control and factors that relate to specific institutional policy. Examples of external factors which affect the possible growth of colleges are the weak market for college educated labor, the increase in demand for vocational and career oriented programs, demographic changes such as regional population shifts and the drop off in childbearing which is greater in the higher income brackets. Although private institutions may attempt to adapt and increase enrollments, factors outside their control can inhibit substantial growth (McPherson, 1978). By expanding the potential student population base, some private institutions have diluted their standards of academic excellence. When private institutions were on a more solid financial basis, "competition for excellence with the public sector often brought out the best in each" (Benezet, 1977, p. 21).

Public and private institutions have begun to compete for the same tax money. At present, the private sector receives most of its public money from the federal government whether directly or indirectly. Although tax money flows to the private sector through a variety of programs, the bulk of the funds are either for student aid or research

grants. While research money is critical to the doctoral granting institution only, the student aid "has become the lifeblood of much of the private undergraduate education. Without it, hundreds of private institutions would close including most of the country's black colleges, a considerable proportion of church-related institutions and numerous small and medium-sized colleges lacking some combination of endowment funds, wealthy alumni and upper-middle class students" (Howe, 1979, p. 29). As a consequence of the two funding sources, most elements of the private sector are relying on the continued federal commitment to higher education.

One result of the increased reliance on federal and state aid is noted in the 1976 establishment of the Washington based National Association of Independent Colleges and Universities. Lobbyists have been hired by state organizations of private colleges. As a result of the private sector's monetary needs, a number of states have developed contradictory approaches to aiding this group. Some "states have discovered that they can save taxpayers' money by paying private colleges to take students rather than further expanding the public institutions.. . . On the other hand, the momentum of growth firmly established in the state-supported systems of public higher education in the 1960's still persists in many states and has resulted in campus capacities beyond practical needs for the balance of the century" (Howe, 1979, p. 29). Due to political pressure and considerations, the public sector will be less likely to have units closing than the private group. Higher education student aid policies of the 1970's resulted in the preservation of many small, economically inefficient private schools.

During the last twenty years, the private sector's income from most of its sources has remained stable, except for a decline in endowments, an increase in financial aid money and a decrease in federal research money. Overall, the private sector is not financially independent of government aid with "the value of current public programs amounting to nearly half of the educational income of private colleges and universities" (Nelson, 1978, p. 68). During this era, two sectors of higher education have been identified as having financial difficulties. First, the private liberal arts sector was noted as being weakened because of its dependence on tuition as a primary source of income. Second, major research institutions were noted as being weakened because of federal decreases in the funding of graduate education and research and insufficient state level increases (Folger, 1977). Although the tuition gap has not changed dramatically between the public and private sectors, "evidence is clear that tuition prices have a significant impact on the public-private enrollment mix" (McPherson, 1978, p. 194).

Any policy that negatively or positively affects the level of tuition can alter the enrollments in the two sectors. Enrollment projections do not appear to make the financial prospects for some private institutions positive. Folger notes the "necessity for more assistance in the form of student aid and/or direct public grants if the private sector is going to retain necessary financial stability" (Folger, 1977, p. 191).

Statement of the Problem

The primary objective of this research is to develop a set of guidelines for examining the appropriateness and legality of state aid to private colleges and universities and to examine the usefulness of these guidelines by comparing the State of Florida's Tuition Voucher Fund with them. A subsidiary objective is to update the body of law and state level programs related to this topic. The design includes the following components:

1. A review of federal and state legal precedents for aid to private and sectarian institutions. Both case and statutory law are reviewed.
2. An examination of existing state programs.
3. The development of guidelines for determining legality of governmental aid programs to private colleges.
4. A summary of the background and components of Florida's Tuition Voucher Fund including financing and eligibility.
5. An illustration of the usefulness of the guidelines by applying them to the Tuition Voucher Fund.

Delimitations

The critical delimitation of this study is the types of governmental aid programs examined. State and federal programs devised specifically for aid to private colleges and universities are examined. In states that aid private colleges or their student population, programs that aid students attending either public or private institutions are reviewed. The body of law makes a clear distinction between aid to K-12 private, sectarian schools and higher education institutions of this nature. This study observes the legal distinction.

Some of the cases reviewed refer to programs of aid that include both private and public institutions. These decisions must be reviewed because of the precedents for governmental aid that are aimed directly at private institutions or their student bodies.

Limitations

The study is limited by the precedents established in case and statutory law (courts and legislatures). The emphasis is on governmental aid that is aimed directly at private colleges and universities and their student bodies.

Justification

The higher education industry is retrenching. Because of projected enrollment declines and cost increases, a number of institutions have entered a difficult period. Private colleges generally have had a more difficult plight than publicly funded units, with the under-endowed four year liberal arts colleges being the most vulnerable sector. The private colleges have relied on state and federal money to keep them solvent. A number of states have developed programs that directly aid the private institution or its student body.

Presently, the courts have given a number of contradictory signs about what is permissible in terms of public aid to private institutions of higher education. Questions such as what is excessive entanglement or what defines an institution as sectarian have not been clearly delineated. In some cases, types of aid that have been judged as illegal in one case are ruled as acceptable in the next Supreme Court decision. A number of state constitutions also limit the types of aid that are permissible.

Justification for this research is the need for analysis of the validity and appropriateness of governmental aid to private institutions in relation to the legal principles of American higher education. From the various federal and state cases, conclusions about what is permissible aid are drawn. In conjunction with the development of legal-related criteria, the need for the infusion of funds and types of permissible programs are reviewed. This review places the guidelines in the broader perspective of the actual situation in the higher education industry.

Assumption

The assumption is that the educational experience at some private, religiously affiliated institutions differs considerably from the experience at other colleges of this nature. The type of experience affects the eligibility of a college to participate in a state tuition aid program. In some instances, the secular educational experiences found at public and private nonsectarian colleges are similar to the setting at the religiously affiliated institutions. For example, the overall programs at a state university and a large, research oriented private college are similar. The situation at small liberal arts colleges, whether state funded or private affiliated, likewise is analogous. In contrast, the educational experience at religiously affiliated colleges can vary widely. At one college, the secular educational activities can be separated from the sectarian ones. In another institution, the educational experience itself is sectarian.

Colleges that are defined as pervasively sectarian are excluded from participation in tuition aid programs. There are institutions which may not be defined as pervasively sectarian that do not separate their secular and sectarian functions. At these colleges, funds from tuition aid programs can be channeled into sectarian or unconstitutional activities. Programs that aid religiously affiliated colleges should contain guidelines that define pervasively sectarian educational settings. The need for the separation of the secular and sectarian functions should be spelled out. A state aid program should contain a restriction that the funds be limited to secular educational functions.

Procedures

In this section, the development and sequence of the research will be outlined. The material covered will be limited to that of the American higher education scene. The study will be divided into three sections: background-court decisions and legislation, development of guidelines and review of the components of Florida's Tuition Voucher Fund and the illustrating of the usefulness of the guidelines by applying them to the Tuition Voucher Fund.

A variety of legislative and constitutional statutes on the federal and state level will be examined. These statutes range from total prohibition of public aid to private institutions in some states to elaborate programs to assist these colleges in other states. The court decisions involving private colleges and universities will be examined. A number of legal decisions on the federal level will be reviewed due to the precedents that were established. Many of the state-level decisions and programs are based upon the precedents established on the federal level. Legislation from states other than Florida will be summarized. Trends in the types of legally permissible aid will be noted. The State of Florida's Tuition Voucher Fund will be examined in detail. Coverage will include discussion of the adoption of the law, eligibility, procedures for disbursement of funds and the scope of the program.

Guidelines for what constitutes a valid state aid program will be developed. Six to eight guidelines will be defined from case and statutory law. Florida's Tuition Voucher Fund will be analyzed according to the guidelines in order to illustrate their usefulness. Conclusions on the legality of Florida's program will be noted.

CHAPTER TWO
SUPREME COURT CASES

Background

From their inception, private and public institutions of higher learning received public support. During the colonial era, some of the colleges that received public assistance were Columbia, Brown, Dartmouth, William and Mary and Yale. In the early 19th century, governmental support for colleges and universities decreased. During this period, the distinction between state and private schools had not been established (Smith, 1975).

The post-revolutionary era developed a body of law that has influenced the issue of public money to private higher education institutions. The religious clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion or the prohibiting the free exercise thereof" (U.S. Constitution, Amendment 1). This amendment established the concept of the separation of church and state which is known as the "Establishment Clause." At the time of ratification, a number of states had established religions and there was strong sentiment against infringement by the national government. The emphasis of this amendment was not on individual rights to religious freedom but on the protection of the states' rights to continue their established religions.

A number of revolutionary leaders such as Jefferson, Madison and Penn were opposed to church establishment of any form. They spearheaded a drive which resulted in the inclusion of the separation of church and state or the religious freedom concept in every state constitution (Albrecht, 1967). As late as 1916, the U.S. Supreme Court had not applied the religious restrictions of the First Amendment to the states. In Hamilton v. Regents, 293 U.S. 245 (1934), the Court ruled that the religious guarantees of this amendment were enforceable against state action (Schauf, 1971).

The Fourteenth Amendment covered the same ground as the First on the state level by noting:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law. (U.S. Constitution, 14th Amendment)

In Cantwell v. Connecticut, 310 U.S. 296 (1940), the First Amendment was made binding or absorbed into the Fourteenth Amendment and applied to the state level. In this case, the Supreme Court reviewed the convictions of two Jehovah Witnesses for soliciting on the streets. The majority decision ruled that the Fourteenth Amendment prohibited the legislatures of states from enacting laws against the free exercise of religion (Albrecht, 1967). Even prior to this decision, many State Supreme Courts had applied this concept by "strictly enforcing their own constitutions which prohibited the granting of public funds for religious schools including colleges" (Smith, 1975, p. 565). Though

some states have enacted less restrictive legislation, the constitutional religious freedom clauses remain in others.

At the time of the Constitutional Convention, a number of delegates thought that the General Welfare Clause reserved control of education for federal government. This view was supported by Alexander Hamilton and constitutional amendments were unsuccessfully attempted by Jefferson in 1806 and Madison in 1817. Public education became the domain of the individual states as part of the powers reserved to the states by the Tenth Amendment (Ford, W., 1972).

The application of the First and Fourteenth Amendments has a basic limitation in providing answers to the issue of legality of governmental aid to private education. There are no precedents from the revolutionary era. The framers of the Constitution did not contemplate the issue of governmental aid to private higher education. The constitutional limitations of legislation on religion are applied in two ways. First, the executive branch cannot decree acceptance of any creed or practice of worship. Second, the Constitution safeguards the right to exercise the religion of choice. In church related educational programs, religion and education are often merged. When the government, state or federal, attempts to assist these programs, the constitutional issue about the establishment of religion is raised (Ford, W., 1972).

With the establishment of the United States in 1783, the attitude of the federal government toward higher education was one of non-involvement. Aid to colleges and universities was not included in the Constitution and became reserved for the states. The only type of aid on the

federal level during the first half of the 19th century was that of land grants. The first landmark of federal aid to higher education was the Morrill or Land Grant Act of 1862; this act established two precedents to be noted in later aid programs. In providing for a specialized higher education activity through the sale of public lands, the policies of non-intervention by national government and the treatment of public and private institutions on an equal basis were established. A further precedent was set by the National Defense Act of 1916. This act initiated the widespread practice of contractual buying of services by government from private and public colleges and universities (Ford, L., 1972).

The 1950's marked a new era of interaction between the federal government and higher education. The National Science Foundation was established and given authority to allocate overhead or expense funds for administrative costs of grants. Allowances have grown from 5% to 30-40% presently.

In 1950, the College Housing Loan Program was enacted. This program of low interest loans provided money for physical facilities and established a trend of state and federal governments to develop the physical plants of colleges while avoiding involvement in the internal affairs of the institution. The 1958 National Defense Education Act increased federal involvement in higher education. A majority of funds went to student loans and graduate fellowships as money was indirectly channeled to the colleges and universities. "A major stumbling block in Congress' decision to channel its funds indirectly . . . seems to have been its misgivings over the church-state

issue" (Ford, L., 1972 p.545). This strategy avoided open debate on the church-state question.

The Kennedy/Johnson era produced two pieces of legislation directed toward higher education. The Higher Education Facilities Act of 1963 continued the federal tradition of assistance for physical facilities by authorizing over $1 billion in grants and loans for the construction of classrooms. The Higher Education Act of 1965 was part of the massive domestic authorizations of the early Johnson era and furthered the role of the federal government in higher education. This bill distributed funds to students, states and institutions for specific purposes.

Fourteenth Amendment

One specific legal aspect to be reviewed is the relationship between the private university and governmental regulation. A number of constitutional amendments have attempted to limit governmental action. On the state level, this was done through the Fourteenth Amendment. Private universities are theoretically beyond the scope of many of these constitutional mandates since they function as private corporations. The courts have expanded the concept of "state action" and have created situations where private institutions actions fall within the parameters of the Fourteenth Amendment.

By defining the private university as a company town, the Fourteenth Amendment can be applied. The university is "viewed as a community which exercises power and performs functions in much the same way as a public municipal corporation.. . . A university has the effective power to prevent its residents' exercise of constitutional rights" (Schubert, 1970, p. 325). Under this definition, the university's actions are similar to those of a state and come under the jurisdiction of this amendment. Similar to the company town, the university establishes rules and regulations that control a major portion of the lives of the student body. The university is able to enforce the regulations similarly to a public municipality by having its own internal judicial system.

In providing education to a large number of persons, the private university is performing a public function that could fall under governmental regulation. Private colleges fill the same role as public universities. States regard private education to be of such importance that regulations have been passed on such factors as minimum equipment and capital requirements, types of degrees, operation of university boards of trustees and racial and religious discrimination. This public function is recognized by the exemption of private universities from various forms of taxation. These exemptions may be viewed as indirect state subsidies. Other recognitions of the public role of private education are the application of a number of loan and scholarship programs to the private sector student body and the considerable portion of public funding that is directed to these institutions.

To date, the courts have ruled that the education as a public function argument is not sufficient for private universities to fall within the scope of the Fourteenth Amendment. To many any activity that has some degree of public interest subject to the Fourteenth Amendment would cause substantial change in existing law and bring many private corporations, in and outside of education, under closer public regulation. The act of chartering a corporation does not result in the chartered organization being subject to the amendment.

Cases in the 1960's have attempted to define the point where a private university's action becomes state action and therefore subject to the limitations of the Fourteenth Amendment. In Hammond v. University of Tampa, 344 F.2d 951 (1961), a Federal Court of Appeals ruled that the use of surplus city buildings and land by a private university constituted sufficient state action to apply the Fourteenth Amendment. In Powe v. Miles, 407 F.2d 73 (1968), another Court of Appeals ruled that this amendment's due process protection applied to students being expelled from Alfred University, a private institution. Two years later a N.Y. Supreme Court reinstated a student who had been expelled from another private institution in Ryan v. Hofstra University, 324 N.Y.S.2d 964 (1971). In Bucton v. National Collegiate Athletic Association, 366 F. Supp. 1152 (1973), a federal district court restored two students to the Boston University's ice hockey team. In these two cases, the rationale of the courts was that the public funding at the schools had made the schools' expulsions state action (Smith, 1975).

In Tilton v. Richardson, 403 U.S. 672 (1971), the four dissenting Justices feared that the needed surveillance would result in federal

control that would be repugnant to church officials. The federal intervention would impose the Fourteenth Amendment on the sectarian colleges and would sufficiently change their basis of operation.

The financial realities for private colleges and universities have resulted in a trend of trading autonomy for dollars. Under these circumstances, the theory of governmental instrumentation or "whatever is financed by the government sooner or later becomes under governmental control" is imposed. For private colleges, the point of application of the Fourteenth Amendment is "beginning to turn on the degree to which they are publically financed or otherwise entangled with the state" (Smith, 1975, p. 580).

First Amendment

On the federal level, First Amendment applications have been applied to similar situations as of the Fourteenth Amendment on the state level. As the scope of federal assistance to education grew, the national government needed to determine whether a college or university was eligible for the aid. Instead of directly setting the standards for evaluating the institutions, the federal government has relied on a number of accrediting agencies to insure standards of eligibility. These agencies collect information from the institutions during the process of accreditation. If an agency collects information or makes decisions

in relation to federal aid eligibility, the accrediting group becomes intertwined with the government. Under these circumstances, the agency could be defined as a quasi-governmental agency and should be subject to the same constitutional principles and limitations, especially the First Amendment.

The First Amendment guarantees a series of freedoms including free exercise of religion, freedom of speech, and free assemblage or association. While there is no constitutional bar against private party actions that deprive rights, the First Amendment applies when a governmental agency deprives an individual of constitutional rights. If accrediting agencies are defined as private associations, these bodies cannot infringe on constitutional rights. If they are defined as being entangled with the government, the constitutional rights become applicable.

Private parties can be defined as being involved in "state action" and consequently restricted by the constitutional limitations. Examples of state action are the private leasing of publically owned facilities or the exercising of powers traditionally reserved to the government. The argument of state action being applied to accrediting bodies was positively noted in Marboro Corporation v. Association of Independent Colleges and Schools, 556 F.2d 78 (1977) and Majorie Webster Junior College v. Middle States Association of Colleges and Secondary Schools, 302 F. Supp. 459 (1969). The nature of accrediting agencies' work is quite sensitive. Private information about students may be tapped. There is a need for the protection of the individual student's rights from these agencies that the federal government relies upon (Thal, 1979).

Everson v. Board of Education

A series of federal and state court cases have dealt directly with the question of governmental aid to private institutions. In many cases, the decisions have involved the Establishment Clause. Everson v. Board of Education, 330 U.S. 1 (1947) upheld a statute that authorized reimbursement of bus fares to parents of children who attended either public or sectarian schools. A five man majority interpreted the first amendment as to require the state to be neutral toward religion and compared the bus reimbursement to police or fire protection. The program was defined as an extension of state benefits to all citizens and fell under the concept of general welfare education. This was consistent with the neutral attitude necessary for compliance with the First and Fourteenth Amendments (Sauser, 1977).

The significance of Everson v. Board of Education was that this was the first application by the Supreme Court of the Establishment Clause in cases involving public assistance to private education and represented the Court's attempt to formulate a definition toward this clause. Through the Fourteenth Amendment, states are barred from enacting any laws regarding the establishment of religion (Greenewalt, 1978). The Supreme Court defined the scope of the Establishment Clause for federal and state governments by stating:

> Neither can pass laws which aid one religion, aid all religions or prefer one religion over another . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. (330 U.S. 1, 15-16 (1947))

Abington School District v. Schempp

In Abington School District v. Schempp, 347 U.S. 203 (1963), the Court attempted to formulate a "primary purpose test" to resolve potential conflicts about the Establishment Clause. The case analyzed a Pennsylvania statute that authorized selected readings from the Bible and a Baltimore School Commissioner's regulation that permitted teachers to begin the school day by reciting the Lord's Prayer or reading from the Bible. The majority concluded that both rules departed from the necessary constitutional neutrality and violated the Establishment Clause (Ford, W., 1972).

The decision in this case was not as significant as the Court's comments regarding what action was defined as acceptable. The opinion noted:

> The test may be stated as follows: What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. (374 U.S. 203, 222-223 (1963))

The concept of a test to evaluate a contradiction with the Establishment Clause was developed in this decision and further defined in a number of later decisions. The analysis of legislative purpose has been incorporated as part of a three-tier test to evaluate potential conflict with the Establishment Clause. The concepts of primary effect and excessive entanglement are developed in later cases. A

number of potential aid programs were declared unconstitutional because of invalid legislative purpose. In these cases, the Court only applied and discussed the legislative intent because this caused unconstitutionality (Blanton, 1978).

Horace Mann League v. Board of Public Works of Maryland

In one state case, Horace Mann League v. Board of Public Works of Maryland, 200 A.2d 51 (1966), a court attempted to apply a formula to evaluate if specific colleges were eligible for state aid. This was the first case to deal with the constitutionality of governmental grants to church related colleges. The Court was evaluating the eligibility of private colleges for matching grants from the State of Maryland for the construction of facilities. Since Maryland had no specific constitutional provision on grants to religious groups, the State's Court of Appeals based its decision on the First and Fourteenth Amendments. A distinction was made between secular and sectarian schools since these Amendments were interpreted to bar state aid to sectarian colleges even for such secular purposes as eating and sleeping accommodations (Greenewalt, 1977).

The decision of whether an individual school was secular or sectarian was based on the following factors:

1. The stated purposes of the college;
2. The college personnel, which includes the governing board, the administrative officers, the faculty and

the student body (with considerable importance being placed on the substantiality of religions control over the governing board as a criterion of whether a college is sectarian;

3. The college's relationship with religious organizations and groups, which relationship includes the extent of ownership, financial assistance, the college's memberships and affiliations, religious purposes, and miscellaneous aspects of the college's relationship with its sponsoring church;

4. The place of religion in the college's program, which includes the extent of religious manifestation in the physical surroundings, the character and extent of religious observance sponsored or encouraged by the college, the required participation for any or all students, the extent to which the college sponsors or encourages religious activity of sects different from that of the college's own church and the place of religion in the curriculum and in extra-curricular programs;

5. The results or outcome of the college program, such as accreditation and the nature and character of the activities of the alumni;

6. The work and image of the college in the community. (200 A.2d 51, 65-66 (1966))

The Maryland legislature had authorized matching grants of $750,000 to the College of Notre Dame and St. Joseph's College and $500,000 to Hood College and Western Maryland College for the erection of buildings. Of the colleges evaluated, Western Maryland, a Methodist institution, and Notre Dame and St. Joseph's, both Roman Catholic, were declared sectarian. In spite of a religious orientation and receipt of church funds, Hood College was declared to be non-sectarian and eligible for matching construction funds. Since the Supreme Court declined to review the case, the precedent established was not sufficiently strong. The Appellate decision clouded the guidelines for determining what is

legal governmental aid to private colleges. The sectarian test applied to the four colleges was not sufficiently clear in interpretation or application (Albrecht, 1967).

Board of Education v. Allen

Board of Education v. Allen, 392 U.S. 236 (1968) reinforced the Supreme Court's decision noted twenty years previously in Everson and Schempp. This case dealt with a challenge based on the Establishment Clause against a New York State statute for book loans to sectarian primary and secondary schools. After a sequence of differing opinions, the Supreme Court affirmed the decision of the New York Court of Appeals. The Court ruled that the circumstances were similar to Everson in that the statute had a secular legislative purpose and a primary effect that neither advanced nor inhibited religion (Sauser, 1977). The Court stated:

> The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools and the financial benefits is to parents and children, not to schools. (392 U.S. 236, 243-44 (1968))

Critical to the decision was the fact that the textbooks were provided for purely secular courses. Justice White's majority opinion utilized Justice Blacks' definition of the Establishment Clause from

Everson and applied the "primary purpose test" found in Schempp (Ford, W., 1972).

Although the case dealt with educational material from elementary and secondary schools, the decision established precedents utilized in a number of decisions that relate to higher education. The case applied the first two elements of the three part, constitutional test. The successful fulfillment of a secular legislative purpose and a primary effect that neither advances nor inhibits religion are necessary for the application of the third part of the constitutional test or excessive entanglement.

In a lengthy footnote, Justice Powell discussed what amounts to primary effect. The definition distinguished between indirect or incidental effect and secondary or partial effect. A primary effect was defined as an important effect rather than the single most important effect. Aid that has a primary secular effect can still violate "the Establishment Clause so long as an effect of advancing religion is direct and immediate as opposed to indirect and incidental or remote and incidental. So it is not simply a question of ranking or weighing effects, it is also a question of determining in another sense what type of effect is involved" (Blanton, 1978, p. 338). Although the Court has defined what is acceptable effect, the church or religious sect may view the aid as having a different primary aim. In this case, the Justices agreed on the limitations imposed by Justice Black on acceptable aid while they divided on the nature of the New York Law and its impact (Ford, W., 1973). Later decisions dealt more specifically with this issue.

Walz v. Tax Commission

The decision in Walz v. Tax Commission, 397 U.S. 664 (1970), did not directly involve higher education but did establish the final segment of the three-tiered test. The question of excessive governmental entanglement with religion was first discussed in this case which dealt with tax exemptions for places of religious worship. "Excessive entanglement" is applied to judge the validity of public aid to private institutions.

In this case, the Supreme Court upheld the universal exemption from state taxation accorded property and institutions used exclusively for religious, educational or charitable purposes. Although conceding that the tax exemption constituted a type of governmental aid, the majority based the decision on the religious clauses of the First Amendment. A statute that created an excessive governmental entanglement with religion was defined as unconstitutional even if the statute did not have the general purpose or effect of advancing religion (Ford, W., 1972). The Court was concerned that government would become more involved with religion if the 300 year exemption from taxation was removed than if it were allowed to remain. The majority decision felt that the potential of churches supporting governments was less likely than the possibility of the government supporting churches. The decision applied the argument that constitutional neutrality in the area of religion

> cannot be an absolutely straight line, rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded and none inhibited . . .

> The general principle to be derived from the First Amendment and all that has been said by the Court is thus: that we will not tolerate either governmentally established religion or government interference with religion. (397 U.S. 669, 674 (1970))

Walz v. Tax Commission did not break any new jurisdictional ground. The case involved churches, not schools and passive rather than active governmental intervention. The critical nature of this decision was the theory of excessive entanglement developed by the Chief Justice Burger. This case elaborated the third element of three part test although the term was not used at the time. Almost parenthetically, the Court recognized how excessive entanglement must be applied to church related organizations and the state. The decision established "that churches have a right to take stands on constitutional issues and that their doing so is not an excessive entanglement. In fact, no absolute separation is possible. The need to use the term excessive entanglement proves that there will be some involvement. . . . Given the presence of some involvement, the determination must be made as to what kinds are least apt to lead to excessive involvement" (Blanton, 1978, p. 366).

The Court established a broad category of exempted groups and noted that governmental study of the activities of an exemptee would create excessive entanglement and terminate neutrality. The Court had brought the First Amendment and the concept of excessive entanglement between religion and government into a modern day interpretation. The aim of the Court in future decisions is to choose the type of involvement that is lesser (Ford, W., 1973). Although the final element of the three-tiered test was enunciated in this decision, the

boundaries of excessive entanglement were left vague and not defined until a later case.

Lemon v. Kurtzman

In Lemon v. Kurtzman, 403 U.S. 612 (1971), the Supreme Court utilized the complete sequence of the three-tiered test of the Establishment Clause for the first time. This case involved two companion briefs, Earley v. Di Censo and Robinson v. Di Censo with Chief Justice Burger's majority decision covering both. Statutes from the States of Rhode Island and Pennsylvania were involved. The Rhode Island act decreed that a less than 15% salary supplement to be paid non-public school teachers. The school at which a teacher taught had to spend less per pupil than the public schools and the eligible staff had to teach a secular subject. A federal district court ruled that the statute was in violation of the First Amendment by fostering excessive entanglement between government and religion.

The Pennsylvania law granted the state the right to purchase directly from non-public schools certain secular educational services that included expenditures on teachers' salaries, textbooks and instructional materials. Both this and the Rhode Island statute required the participating schools to keep financial records that the state would audit. The challenge to this statute was dismissed by a federal district court which rejected the statute but found the facts in plaintiff's arguments true (Blanton, 1978).

At the outset of the majority decision, Chief Justice Burger outlined the "cumulative criteria" that had been developed in the previous decisions. The guidelines were:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243; finally, the statute must not foster an excessive government entanglement with religion, Walz at 674. (403 U.S. 612, 613 (1971))

Regarding the concept of secular purpose, the Court did not find fault with the legislative purpose of either state's statutes. According to the decision, the law intended to enhance the quality of secular education in Rhode Island and Pennsylvania with the two states having a valid concern in this area.

In terms of primary effect, Chief Justice Burger skipped this question in spite of it being listed as second in the previously noted "cumulative criteria." Since the Court had found excessive entanglement, the question of primary effect did not have to be considered (Blanton, 1978). The majority did acknowledge that the church related primary and secondary schools involved in this case did have a significant religious mission with a substantial number of religiously oriented activities. The respective legislatures had adopted restrictions that were designed to guarantee a separation between secular and religious educational functions (Ford, W., 1972). In this case, the Supreme Court did not elaborate upon how to define what is primary effect.

In relation to excessive entanglement, the Court first analyzed the concept by stating:

> In order to determine whether the governmental entanglement with religion is excessive, we must examine the character and the purposes of the institutions which are benefitted, the nature of the aid that the state provides, and the resulting relationship between government and the religious authority. (403 U.S. 612, 615 (1971))

The decision found that both statutes fostered an impermissible degree of entanglement. In the case of the Rhode Island statute, the Court agreed with the district court that the parochial schools involve considerable religious activity and purpose. Regarding the private schools of Pennsylvania, the Court noted that the educational system were very similar to Rhode Island. In both cases, the type of activities were deemed as entangling and were what the religious clauses sought to avoid. Chief Justice Burger concluded:

> The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the religion clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family and the institutions of private choice, and that while some involvement and entanglement is inevitable, lines must be drawn. (403 U.S. 612, 625 (1971))

In Allen v. Board of Education, the dissenting justices were questioning how to determine if a textbook's contents were truly secular. The majority in this case concluded that the judgment of a teacher's presentation as secular was even more difficult.

The decision in Walz was based on passive governmental action or the absence of taxation. This case contained the direct money subsidy that Walz warned against (Blanton, 1978). The Court further rejected the statutes on the basis of excessive governmental administrative entanglement with religious groups since both programs required state auditing of church related schools' financial records. In noting the "comprehensive, discriminating and continuing statute surveillance" (403 U.S. 612, 619 (1971)), the Court recognized the possibility of the programs creating political conflict by entangling politics with religion.

This case developed the procedures for what has been termed the 'entanglement analysis." In order to demonstrate unconstitutional entanglement or the lack of, the following questions must be asked:

1. What is the nature of the institution being aided? Is it sectarian? What are its character and purpose?
2. What is the nature of the aid being given? How does it help the institution?
3. What is the nature of the resulting relationship between the institution and the government? (Blanton, 1978, p. 360)

For statutes that attempt to aid sectarian primary and secondary schools, the likelihood of successfully meeting the three critical requirements appears remote after the decision in Lemon v. Kurtzman.

Tilton v. Richardson

On the same day as the decision in Lemon v. Kurtzman, the Supreme Court ruled on Tilton v. Richardson, 403 U.S. 672 (1971). This decision was also written by Chief Justice Burger and involved the related issue of federal aid to sectarian colleges and universities. The funding was for facilities at higher education institutions not for salaries or teaching materials for primary and secondary schools. By a five to four vote, the Court upheld the use of these federal funds for this purpose. The twenty year non-religious use clause for the new buildings was ruled unconstitutional. The clause was expanded for the life of the buildings.

The four colleges, Sacret Heart University, Annhurst College, Fairfield University and Albert Magnus College, received federal funds under the Higher Education Facilities Act of 1963 to build facilities. Examples of the types of facilities built included library buildings, arts buildings, science buildings and language labs. The suit was brought by residents of Connecticut with the defendants being federal officials and the colleges (Blanton, 1978).

Similar to the previous case, the Court dismissed any conflict with the Higher Education Act's secular purpose. The majority held that the bill stated a valid secular objective appropriate for governmental action. The Court related the concept of secular purpose to modern times by noting the demand for the expansion of higher education.

The primary effect concept was the critical point on which The Higher Education Act was challenged. "The critical question is not whether some benefit accrues to a religious institution as a consequence of the legislative program but whether its principal or primary effect advances

religion" (403 U.S. 672, 679 (1971)). In noting the distinction between the depth of the secular educational experience on the secondary and college levels, Chief Justice Burger concluded that the level of permeation by religion on the higher level was not so pervasive that the aid would advance religion. The courses at the collegiate level were taught according to academic requirements and the institutions subscribed to the 1941 Statement of Principles on Academic Freedom and Tenure endorsed by the American Association of University Professors and the Association of American Colleges. The majority did concede that primary effect could be circumvented either intentionally or unintentionally but this was not sufficient to rule the statute unconstitutional.

In relation to excessive entanglement, the critical issue was whether the differences between higher education and primary and secondary education were sufficient to insure no entanglement. The Court noted that excessive entanglement could be fostered by the strict surveillance required to guarantee secular usage of funds, regulations which involved the state in the everyday affairs of a school or arrangements that required continued affiliation between church and state. On a number of levels, the Court noted a sufficiently lessened degree of governmental entanglement. The colleges were defined as being primarily concerned with secular education. In contrast to the schools in Lemon v. Kurtzman, the functions of the colleges were not an integral part of the religious mission of a church or sect. College students were perceived as less impressionable and less susceptible to religious doctrine. The discipline oriented framework of college courses denoted a sectarian influence. Many of these courses required critical responses

from their students and were characterized by academic freedom. The requirement that student attend a required number of theology courses was not perceived as a means of indoctrination since these courses were taught with academic requirements and professional standards similar to the secular courses.

The Court further noted a lack of entanglement in terms of the actual aid. This type of aid was non-ideological because it was not directed to the salaries of possibly non-neutral teachers. There was a lack of continued financial relationships and there were no annual audits. These factors were in contrast to the circumstances in Lemon v. Kurtzman (Greenewalt, 1977).

Three distinct concepts entered into the majority decision: the inherent difference between the nature of higher and secondary and primary education; the difference between subsidizing facilities and teachers' salaries; and the contrast between one-time grants and continuing support. The decision was based most heavily on the first concept (Ford, 1972). Chief Justice Burger stated:

> In light, inter alia, of the skepticism of college students, the nature of college and post-graduate courses, the high degrees of academic freedom characterizing many church-related colleges, unlocal constituency, and lack of continuing financial relationship, one-time construction grants to colleges and universities, as opposed to continuing subsidization of teachers in primary and secondary schools, do not foster excessive government entanglement of religion in violation of the First Amendment. (403 U.S. 672, 686 (1971))

By emphasizing the distinction between higher and primary and secondary education, the Court avoided ruling on the issue of whether an institution was pervasively sectarian or not. An evaluation of whether a college's secular program was distinct from its religious function was substituted (Greenewalt, 1977). The majority opinion rejected the use of the "composite profile" of a sectarian college. This was ruled not applicable to the case since the plaintiffs had not identified nor demonstrated the four colleges as such. The elements of the hypothetical profile included imposing of religious restrictions on students admitted, requiring the attendance at religious activities, compelling the obedience to the doctrines and dogmas of a faith, requiring of instruction in theology and doctrine and the acting of the college to propogate a particular religion. The Court did not reject the utilization of this profile in future cases (Blanton, 1978).

The four Justice dissenting opinion was written by Justice Douglas. This group felt that there was a grave inconsistency between the Court's earlier decisions, the decision in Lemon v. Kurtzman and the present case's outcome. Justice Douglas stated:

> The majority's distinction is in effect that small violations of the First Amendment over a period of years are unconstitutional (see Lemon and Di Censo) while a huge violation occurring only once is de minimus. I cannot agree with such sophistry. (403 U.S. 672, 693 (1971))

The minority opinion concluded that the character and academic freedom of a church related college or university would be breached if such funds were accepted. The institution would then become bound by governmental standards (Smith, 1975).

In 1973, the Court ruled on two cases that involved tuition voucher plans on the primary and secondary level. The decisions in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), Sloan v. Lemon, 413 U.S. 825 (1973) as well as the companion case of Levitt v. Committee for Public Education, 413 U.S. 472 (1973) were handed down the same day.

Committee for Public Education v. Nyquist

The first case, Committee for Public Education v. Nyquist, involved an amendment to the New York State Education and Tax Laws that allowed payment to private schools with low-income students for maintenance and repair of school facilities and equipment and contained a tuition reimbursement plan and a tax benefit program for parents of the pupils. In terms of the secular purpose aspect of the three part test, the Court found that each section of the Amendment had sufficiently supported legitimate, nonsectarian state interests.

In relation to primary effect, the Court found that all the types of aid violated the Establishment Clause of the First Amendment. In terms of the maintenance and repair provisions, there were no restrictions on the use of payment to only secular purposes. The case was contrasted with Tilton since on this educational level the same facility is often used for secular and sectarian functions. The aid was viewed as having the primary effect of advancing religion in contrast to

Everson v. Board of Education, Allen v. Board of Education and Tilton v. Richardson where the aid was considered to have indirect and incidental benefits. The Court interpreted the tuition reimbursements/tax benefit provisions in a similar fashion. Since these methods did not insure only secular use, the Court concluded that the tax benefits increased the involvement of church and state. Since the N.Y. Amendment was found lacking in effect, the question of excessive entanglement and the related issue of political divisiveness were not evaluated. The Court declined to analyze the characteristics and purposes of the institutions to determine if they were sufficiently secular.

Sloan v. Lemon

Sloan v. Lemon involved the Pennsylvania Reimbursement Act for Non-Public Education. This act called for the repayment of $75 each to parents of children attending non-public primary schools and $150 to parents of secondary school students as long as the amount did not exceed the tuition. A five member committee appointed by the governor was to administer the program. Similarly to Nyquist, the Court encountered no problem in regard to the legislation having a secular purpose and did not analyze the excessive entanglement aspect. The majority opinion of Justice Powell found no significant difference between this case and Nyquist. In both cases, tax money was used to reimburse the parents; the parents were free to spend the funds in any manner; a

class of citizens had been singled out for special benefits; and the effect of advancing religion was direct and not indirect or incidental.

Levitt v. Committee for Public Education

Levitt v. Committee for Public Education was another case involving New York State legislation. This law reimbursed private schools for expenses incurred in the grading and compiling of tests and exams, maintenance of pupil enrollment and health records and the submission of required state reports. In order to qualify, schools submitted an application to the State Commission of Education. Schools which qualified were to receive $27 per pupil for elementary schools and $45 per pupil for secondary schools. The act contained no provisions for state auditing.

In terms of the three-tiered test, Chief Justice Burger dismissed any conflict with the secular purpose concept and did not dwell on the excessive entanglement portion. This case failed in a similar way to Nyquist and Kurtzman. The majority noted:

> The statute now before us, . . . contains some of the same flaws that led the Court to its decision in Nyquist . . . Despite the obviously integral note of testing in the total teaching process, no attempt is made under the statute, and no means are available to assure that internally prepared tests are free of religious instruction. (413 U.S. 472, 479-80 (1973))

The law was ruled unconstitutional not because it would inevitably advance religion but because there was danger that it would and that

there was no adequate provision to guard against this. This argument was used to demonstrate non-compliance with primary effect restrictions, not excessive entanglement as in Kurtzman. Although the case was decided on effect, the conclusions could have been used to demonstrate excessive entanglement.

All of these cases reiterated the primary/secondary school vs. higher education dichotomy. The types of aid were rejected on the primary effect principle. The test has evolved into one that is based on the concept of direct and immediate rather than primary aid. In Nyquist, each effect was analyzed to note whether it was direct and immediate rather than remote and incidental. The Court used an identical approach to the excessive entanglement portion for all these cases involving elementary and secondary schools. Once the aid was rejected on the basis of an illegal primary effect, the Court did not elaborate on the question of excessive entanglement (Blanton, 1978).

The result of the decisions in the three cases was "to reduce to a minimum the types of programs that states may adopt to assist parochial schools or the children attending them" (Kaupner, 1975, p. 126). The types of aid prohibited for private primary and secondary schools include subsidies of salaries for teachers, grants to assist in maintenance and repair costs, aid to pay for the costs of state mandated educational services or income tax deductions. Allowable aid includes funding for bus transportation and secular textbooks for sectarian schools. The primary effect and excessive entanglement sections of the three-tiered test have proved to be difficult barriers for potential aid to primary and secondary schools.

Hunt v. McNair

In the same year, the Supreme Court issued an opinion in Hunt v. McNair, 413 U.S. 734 (1973), a case that dealt directly with aid to higher education. This case was brought against the South Carolina Educational Facilities Act which authorized the issuance of revenue bonds for the building of facilities at the Baptist College at Charleston. The act authorized the college to be the beneficiary of tax free bonds which were issued by a separately created authority and were purchased by the public. According to the act, the State of South Carolina retained no direct or indirect obligation from the bonds. Since the bonds were to be paid off by the sponsored projects, no governmental funds were involved.

The Supreme Court of South Carolina found the act constitutional twice with the second time being a reconsideration in light of Kurtzman. On the federal level, the six to three majority decision was written by Justice Powell.

In relation to the three part test, the secular purpose was reviewed in the South Carolina statute which stated:

> It is essential that institutions for higher education within the State be provided with appropriate additional means to assist such youth in achieving the required levels of learning and development of their intellectual and mental capacities; and that it is the purpose of this section to provide a measure of assistance and an alternative method to enable institutions for higher education in the State to provide the facilities and structures which are sorely needed to accomplish the purposes of this act, all to the public benefit and good to the extent and manner provided herein. (413 U.S. 734, 741-42 (1973))

The Court agreed that the purpose of the act was secular since 95% of the students attending Baptist College were residents of South Carolina. According to the decision, all colleges and universities in South Carolina, whether secular or sectarian, were eligible to receive funds through the revenue bonds.

In the primary effect section, Justice Powell elaborated on a number of previously mentioned concepts. The Justice noted that there is a flexibility in dealing with the Establishment Clause and that several cases had rejected the theory that any aid constitutes primary effect. In considering this factor, the Court narrowed the "focus to only that part of the statute which is presently before the Court, whereas a consideration of purpose entails, ordinarily, the whole statute" (Blanton, 1978, p. 401).

Referring to Tilton, the opinion noted that aid could be barred to an institution of higher education if such a college or university was pervasively sectarian. At Baptist College, the trustees were elected by the South Carolina Baptist Convention; a number of financial transactions required approval from the convention; and the convention was able to amend the charter of the college. In spite of this, the majority decided that Baptist College was not pervasively sectarian. The college also contained the following characteristics: no religious qualifications for faculty members, no religious qualifications for student admission and only 60% of the college student body was Baptist (Blanton, 1978).

The final question to be discussed in this case was:

> Whether under the arrangement there would be an unconstitutional degree of entanglement between

> the State and the College. Appellant argues that the Authority would become involved in the operation of the College both by inspecting the project to insure that it is not being used for religious purposes and by participating in the management decisions of the College. (413 U.S. 734, 745-76 (1973))

The entanglement question dealt with the language of the statute in dealing with the South Carolina Authority's role in case of default. The Court dismissed the language problem since there was a small likelihood of default occurring. The extent of the college's sectarian nature was review by Justice Powell. He restated the dichotomy between higher education and primary/secondary education by concluding:

> There is no evidence to demonstrate that the college is any more an instrument of religious indoctrination than were the colleges and universities involved in Tilton. (413 U.S. 734, 746 (1973))

On a number of judicial points, Hunt v. McNair reinforced or solidified a number of judicial concepts. The decision strengthened the dichotomy between primary and secondary non-public education and private higher education that was first noted in Tilton. The concept of "primary effect" was divided into two steps. First, an aid program was defined as having the primary effect of advancing religion if the institution was so sectarian that the secular functions could not be isolated. Second, an unconstitutional primary effect could be applied if the state aid was found to fund a sectarian activity at an otherwise secular setting. To determine either violation of primary effect, the Court had to examine the character of the institution (Webber, 1977).

With the determination of Hunt v. McNair, the Supreme Court has ruled as allowable a limited form of non-continuous aid. Guidelines and standards for lower courts to evaluate state legislation had been developed through the higher Court's series of decisions. Although an act may be prohibited by a state constitution and permissible under the U.S. Constitution, a statute could not be permitted to continue if it contradicted the U.S. Constitution. The Supreme Court decisions that culminated in Hunt v. McNair have stimulated additional state legislation to aid private higher education institutions. As a by-product, these decisions "have encouraged careful judicial review of state laws under the religious clauses of the First Amendment" (Smith, 1975, p. 590).

Meek v. Pettinger

In Meek v. Pettinger, 421 U.S. 349 (1975), the Court reapplied the three-tiered test to a case involving sectarian aid to primary and secondary schools. The Court reaffirmed the distinction between aid to these types of schools and higher education institutions. The case involved two Pennsylvania acts. The first allowed the borrowing of textbooks and instructional material and equipment such as projectors, recording and laboratory equipment. The second act provided funds for such auxiliary services as counseling, testing, speech and hearing therapy and related services for exceptional and remedial students.

The types of materials and services mentioned were available in the public schools.

In relation to the secular purpose, the Court agreed with the legislative finding that this act had the welfare of the school children in mind. The Court declared the first act unconstitutional upon analyzing its primary effect. Although the Court ruled that the loaning of texts was legal, the majority found the borrowing of instructional material to be impermissible aid since these materials could be used to advance religion. The Court reviewed the characteristics that made the experience at religious primary and secondary schools decidedly sectarian and concluded that the aid was massive and not indirect. This first act was not evaluated in terms of excessive entanglement. In a footnote, Justice Stewart noted:

> Because we have concluded that the direct loan of instructional material and equipment to church related schools has the impermissible effect of advancing religion, there is no need to consider whether such aid would result in excessive entanglement of the Commonwealth with religion through comprehensive, discriminating and continuing state surveillance. (421 U.S. 349, 363 (1975))

The second act which related to auxiliary services was ruled unconstitutional due to impermissible establishment of religion. The services were being performed on the grounds of church related schools. The auxiliary teachers would have needed to remain religiously neutral. This would have imposed limitations on the auxiliary staff's activities and created a need for continuing surveillance.

The decision in this case reaffirmed the traditional split between aid to sectarian primary and secondary schools and institutions

of higher learning. In utilizing the primary effect portion to declare the first act unconstitutional, the Court continued a trend noted in a number of recent decisions. "As the cases build, particularly those concerned with elementary and secondary schools, there often appears less and less, rather than more and more, distinction between the processes in finding a law valid through primary effect and those findings invalidity through entanglement" (Blanton, 1978, p. 407). The key factor has become the nature of the schools involved. Once schools have passed the primary effect clause and are defined as not pervasively sectarian, the excessive entanglement concept is applied less stringently.

Roemer v. Board of Public Works of Maryland

In Roemer v. Board of Public Works of State of Maryland, 426 U.S. 736 (1976), the Supreme Court again applied the three part test to higher education aid and attempted to further define some of the legal concepts. The State of Maryland had provided governmental grants of unspecified purpose to eligible private colleges. The money could not be used for sectarian functions with the formulas for allocation being revised annually. Since five of the schools that received funds were church affiliated, the act was challenged under the Establishment Clause of the First Amendment.

The statute was upheld by a three judge State Circuit Court by a two to one decision. Some of the court's findings included that the colleges had a high degree of academic freedom; most colleges opened classes with prayers; considered the religion of potential faculty in hiring; required courses in theology; had religious based quotas for governing boards and had as a secondary objective the encouragement of spiritual development of the student bodies.

In applying the three-tiered test, the majority found the legislative purpose as secular. Since the act was an attempt to save tax money, the primary effect was viewed as neutral. Each private school was performing a secular educational function; no school required religious attendance; each school had hired faculty of a different faith and each campus adhered to the concepts of academic freedom. Factors reducing the possibility of excessive entanglement were the academic freedom; the secular functions of the colleges; the act's exemption of strictly theological schools and the prohibition against the use of funds for sectarian purposes.

The Circuit Court recognized two distinct differences between this case and Tilton. In that case, the issue was buildings for secular use while in Roemer funds could have been used for teaching salaries. Tilton's funds were not of an on-going nature while, in the later case, there were annual appropriations (Smith, 1975).

The Supreme Court affirmed the Circuit Court's ruling in a five to four decision with Justice Blackmun writing the majority. The Court accepted the lower court's ruling in terms of secular purpose. The aid to private colleges was viewed as a financially acceptable alternative to a completely public system.

The primary effect requirement was applied in accordance with the Hunt specifications. The institutions were analyzed to note if they were so pervasively sectarian that the secular and sectarian activities could not be separated and whether the aid could be applied to only secular activities. The Court examined the lower court's ruling and found the general picture of the institutions to not be pervasively sectarian in spite of some of the activities noted by the lower court. In relation to the sectarian activities clause, this requirement was fulfilled by the statute's prohibition of sectarian uses and by the required enforcement by the Maryland Council of Higher Education.

In discussing excessive entanglement, the Court utilized the three factors stated in Lemon. In relation to the character of the institution, Justice Blackmun referred back to the conclusion reached in the primary effect analysis which ruled the institutions as not being excessively sectarian. The question of political divisiveness was dismissed due to the diversity of the college's student bodies; the extension of aid to non-secular private colleges, and the autonomous nature of the secular institutions.

The critical constitutional difficulty involved the form of the aid. In this area, the Court expanded the scope of permissible aid to private higher education. Justice Blackmun was concerned about the process of aid disbursement and not the use of the state grants. Even though the aid in Roemer lacked the necessary characteristics in Tilton of "no continuing financial relationships or dependencies, no annual audits and no governmental analysis of institution's expenditures" (426 U.S. 736, 763 (1976)), the Court ruled that the act was constitutional.

The Maryland program required less church-state contact than Lemon and involved higher education, not the primary and secondary schools of Lemon. Similar to Tilton, extensive surveillance was not necessary. In contrast to Tilton, the aid of Roemer was of an annual, continuous nature. The majority opinion concluded that the administrative contacts were minimal through the Maryland Council's analysis of sectarian purpose. Once the character of the institutions had been defined as not being pervasively sectarian, the form of the aid and annual contact questions were not as critical. The annual contacts were viewed as no more entangling than the state accreditation process. "Three of the four criteria of the entanglement element were decided, directly or indirectly, on the initial finding of absence of pervasive sectarianism" (Sauser, 1977, p. 384). In the concurring opinion, Justices White and Rehnquist commented on the lack of importance now placed on the excessive entanglement analysis:

> As long as there is secular legislative purpose and as long as the primary effect of the legislation is neither to advance nor inhibit religion, I see no reason . . . to take the constitutional inquiry further. (426 U.S. 736, 768 (1976))

The four dissenting justices claimed that the Maryland act was unconstitutional for a variety of reasons. Justice Stewart took offense with the lower court's lack of classifying the theology courses as pervasively sectarian. Since the theology courses could deepen the religious experience and the aid was noncategorical, Justice Stewart concluded that the statute advanced religion. Justices Brennan and Marshall claimed that any direct state aid to church affiliated institutions would have the result of advancing religion.

The majority decision in Roemer v. Board of Public Works of Maryland had altered the burden of proof concept. For institutions of higher education, the finding of pervasive sectarianism in the primary effect portion of the three-tiered test will disqualify an aid program. The "Court will also not be troubled by the hazards of entanglement or by the dangers of inadvertent subsidization of religious activities" (Sauser, 1977, p. 386).

Permissible aid to institutions of higher education now includes direct non-categorical funding. This decision has prompted a number of state legislatures to enact similar legislation. By emphasizing the distinction between the college and primary and secondary experiences, the court reaffirmed its position on the type of aid permissible on this level. Further definition of the entanglement concept is necessary. As of this decision, the Court has defined the excessive entanglement analysis as non-functional. Later decisions should remove this element and rely principally on the primary effect analysis or reestablish the entanglement concept on an equal basis. Although this case terminates a series of opinions on governmental aid to private education, a number of concepts have remained ill defined. "While it is clear that noncategorical grants are now constitutional, the haze which envelops the religion clauses remain. While successive decisions have whittled away at the more esoteric aspects of earlier pronouncements, there is still no definitive standard available to the legislatures which will enact or to courts which will review programs granting state aid to religiously affiliated schools" (Webber, 1977, p. 922).

Conclusion

With the three primary/secondary school rulings of 1973, the types of permissible aid for these institutions have been defined. Aid that uniquely benefits primary and secondary religious affiliated schools has been defined as not meeting the strict neutrality test and ruled impermissible. Types of aid ruled as illegal include support for the repair and maintenance of schools, reimbursement for mandated services and tuition reimbursement and deduction from income tax. Benefits defined as permissible are programs that have been designed to benefit all school children such as Emerson and Allen and passive exemptions for non-profit corporations such as in Walz (Kaupier, 1974).

With the final Supreme Court decision of Roemer v. Board of Public Works of Maryland in 1976, the Court reinforced the distinction between the educational experience and the role of religion on the higher education level and the primary/secondary school levels. To establish this distinction, the Court has relied on the age and sophistication of college students; absence of restrictive student admission and faculty hiring policies; absence of overt indoctrination and the presence of academic freedom at this level. Once a college or university has been defined as nonsectarian, non-categorical aid could be granted according to the decision in Roemer v. Board of Public Works of Maryland. As private, church-related colleges have increasingly defined themselves as more secular, they become eligible for further public aid (Smith, 1975).

In relation to the Court's decisions on the higher education level, "there might not be a wall of separation between church and state"

(Smith, 1975, p. 571). The Court attempted to minimize interaction between religion and government to prevent state support and involvement in religion or the suppression of religion. The educational function of colleges and universities causes interaction between the state and private institutions on a number of levels. With the decision in Roemer that permits direct money grants to private, religious colleges, the "wall of separation erected by the Establishment Clause has become a blurred, indistinct and variable barrier which likely will not prove insurmountable" (Private Colleges, State Aid, and the Establishment Clause, 1975, p. 998).

According to the Supreme Court, a governmental aid program is permissible if the funds do not go to pervasively sectarian institutions, the statute restricts use of the funds to secular activities and the government is not excessively entangled in the colleges' while attempting to police the aid's use. "The concepts of pervasive sectarianism and excessive entanglement are so elusive, however, that it is extremely difficult to predict with any confidence how the courts will view a specific aid program" (Private Colleges, State Aid and the Establishment Clause, 1975, p. 997).

CHAPTER THREE
LOWER LEVEL COURT CASES

Introduction

On the state level, a number of attempts at aiding private colleges and universities through tuition grant programs has resulted in legal challenges. Some of the programs have been ruled unconstitutional because of conflicts with state or federal constitutional restrictions while other plans were ruled illegal prior to the developments in Roemer v. Board of Public Works of Maryland. Programs have been able to pass through the maze of state and federal restrictions. Due to conflicts with constitutional clauses, a number of programs had to be revised.

A number of earlier court decisions about state bond issues used to construct facilities at private colleges have been included. These cases are valuable since the arguments and precedents are relevant to the tuition grant programs' body of law.

Alabama

In Opinion of the Justices, 280 So. 2d 547 (1973), the House of Representatives of Alabama required a ruling from the State's Supreme

Court on House Bill number 247. This act would have provided tuition grants for residents attending private colleges and universities. In order to receive a grant, an individual had to be enrolled in a Southern Association of Colleges and Schools accredited institution, be a resident of Alabama, be an undergraduate, attend or be admitted for a full academic year and carry a minimum academic load to make sufficient progress toward a degree. The amount awarded to each student was figured at 50% of the average dollar amount of state funds expended per undergraduate student with the State Higher Education System. The program was to be administered by the newly established Alabama Student Assistance Agency.

The opinion of the State Supreme Court was based on the separation of church and state clause as elaborated in the Alabama Constitution. Article 14, Section 263 of this document states: "No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school" (280 So. 2d 547, 552 (1973)). The Supreme Court concluded that the House Bill #247 would violate the State Constitution and the First Amendment of the Federal Constitution. According to the decision,

> The cumulative impact of the relationship between the State and church related institutions which is provided for in H.B. 247 involves an excessive entanglement between the State and religion and would therefore be unconstitutional under the Religion Clauses of the First Amendment to the Federal Constitution, as well as its Alabama counterpart, Article 14, Section 263. (280 So. 2d 547, 553 (1973))

The program devised by the House of Alabama did not include provisions that differed substantially from acceptable plans in other states. In this case, the State Constitution included clauses that created insurmountable legal barriers.

In the Alabama Education Association v. Fob James, 373 So. 2d 1076 (1979), the State Supreme Court evaluated the 1978 Alabama Student Grant Program. The court reviewed whether this program violated the Establishment Clause of the Federal Constitution's First Amendment or the 1901 Constitution of Alabama.

Act 90 of the 1978 Special Session established a student assistance program for bona fide residents of Alabama. The grants would be paid to approved institutions of higher learning and the Alabama Commission on Higher Education was designated as the administrator of the program. The act prohibited the use of money by predominantly sectarian institutions and required periodic auditing of approved colleges to insure that no state funds were used for sectarian purposes.

The Montgomery Circuit Court ruled that the eligible colleges were not prohibitively sectarian, found the secular functions at the institutions to be separate from religious activities and that the law was limited to secular purposes.

The Supreme Court of Alabama ruled similarly to the circuit court. The plaintiff's arguments were based on Opinions of the Justices where the same court had ruled on a similar bill. This opinion was issued prior to Roemer v. Board of Public Works of Maryland and Smith v. Board of Governors of North Carolina. The United States' Supreme Court decisions in these two cases "made it clear that a grant program such

as is established by Act No. 90 does not violate either the Fourteenth or First Amendments to the Constitution of the United States" (373 So. 2d 1076, 1077 (1979)).

The Court evaluated Act No. 90 in terms of the three part test that had been developed in previous decisions. The act was found to have a secular purpose. The decision in Smith v. Board of Governors of North Carolina had affirmed that school grants and tuition credits to students attending partially secular institutions were secular in purpose.

In terms of primary effect, the majority agreed with the trial court that none of the colleges were pervasively sectarian. In relation to excessive entanglement, the Court noted that the Act was similar to the grant programs upheld in North Carolina by the Supreme Court and Americans United for the Separation of Church and State v. Blanton and Lendall v. Cook by federal district courts. The act was acceptable since the funds were paid to colleges to be applied to student bills, the funds were restricted to secular use and students in religious training were excluded.

In relation to the Constitution of Alabama of 1901, the Court concluded:

> Provisions concerning the establishment of religion are not more restrictive than the Federal Establishment of Religion Clause in the First Amendment to the United States Constitution. Consequently, the following federal guidelines in this area, Act No. 90 does not violate Article 1, Section 3 of the Alabama Constitution of 1901, the Alabama counterpart of the Religious Clauses of the First Amendment to the United States Constitution. (280 So. 2d 547, 550 (1979))

This is a case in which the decision relied on a number of legal precedents on both the federal and state level. These legal precedents had defined and expanded what is permissible aid. The legislature of Alabama was able to incorporate a number of these factors that enabled the program to be defined as constitutional. The act properly prohibited the use of funds by sectarian colleges or students in divinity programs. This allowed the program to avoid the pitfalls that caused other acts to be declared unconstitutional.

Alaska

Sheldon Jackson College v. State of Alaska, 599 P.2d 127 (1979), is a case in which the decision was based on the limitations of a state's constitution. Alaska had developed a tuition grant program for state residents. The program attempted to make up the differential between tuition charged at private colleges and state institutions. The annual award could not exceed $2500 with the student being required to apply the whole amount toward tuition.

In May 1976, the State's attorney ruled that the program was invalid by being a direct benefit to private colleges in violation of Article VII, Section 1 of the Constitution of Alaska. This article states:

> The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and

> institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution. (599 P.2d 127, 128 (1979))

When the Department of Administration terminated payment of tuition grants, Sheldon Jackson College filed suit to renew the payments. The suit was suspended when a proposition to amend Article VII, Section 1 to allow such aid was placed on the November 1976 ballot. When the constitutional change was rejected, Sheldon Jackson College renewed its lawsuit. Alaska's Superior Court "concluded that the tuition grant program provides direct benefits to private educational institutions and thus violated Article VII, Section 1" (599 P.2d 127, 128 (1979)). The State's Supreme Court affirmed this decision.

The higher court concluded that the rejection of the constitutional amendment demonstrated a strong support for the public higher education system. Benefit gained through the tuition grant program was perceived as not reflecting neutrality and non-selectivity toward private colleges. Channeling the money through an intermediary such as the student population was declared improper direct aid to private colleges. The direct benefit of this program was viewed as a non-neutral incentive to attend private colleges.

Although this tuition grant program had similar parameters to a number of functioning plans, the program was declared unconstitutional on the state level. Alaska's program was in conflict with Article VII, Section 1 of the state constitution.

Arkansas

Lendall v. Cook, 432 F. Supp. 971 (1977), ruled on the constitutionality of the Arkansas State Scholarship Program. The Act provided scholarships for eligible students at approved public or private in-state colleges. Approved private institutions were defined as two or four year institutions that granted degrees, were accredited by an accrediting agency and certified by the U.S. Office of Education, were operated by and independent board, and subscribed to the tenets of academic freedom. The college could not use the funds for sectarian purposes nor discriminate in regard to the Federal Civil Rights Acts of 1964 and 1968. The funds were paid to the students with the Arkansas Department of Education being responsible for the administration of the program. During the 1975-76 fiscal year, the legislature appropriated $61,000 and $494,000 the next fiscal year. The initial scholarships were restricted to students in their freshman year with the maximum award being $300.

In September, 1975, the Arkansas Attorney General reviewed the program and suggested that the private colleges be evaluated under the standards developed in Americans United for the Separation of Church and State v. Bubb. Subsequently, the Board of Higher Education circulated questionnaires that listed the guidelines of this previous case. After evaluating the twelve religously oriented colleges that were eligible, Crowley's Ridge College, Central Baptist College and John Brown University were defined as excessively sectarian. After submitting additional information, John Brown University was reinstated as an approved college.

The plaintiffs brought suit claiming that the program was in violation of the Establishment Clause of the U.S. First Amendment. After being considered by the Arkansas Court system, the Federal District Court reviewed the lower court decision. The later court utilized the three part test. In terms of secular purpose, the court concluded that the act was within the permissible range. In regard to whether the act had the primary effect of advancing religion, the court had to review "whether the Arkansas private colleges which are approved, and are therefore, in a position to derive benefit from the scholarship program, are so pervasively sectarian that the sectarian activities cannot be separated" (432 F. Supp. 971, 978 (1977)).

The court concluded that there was no conflict with the primary effect test. While the Supreme Court had not adopted specific guidelines to evaluate primary effect, the application of the Americans United for the Separation of Church and State v. Bubb criteria was clearly sufficient to insure that none of the colleges were pervasively sectarian. The court further concluded that the state funds had been sufficiently restricted to secular activities at the approved colleges.

The final section of the test is the question of excessive entanglement. The critical issue was whether the act created such a close surveillance that there was excessive entanglement between the state and religiously oriented colleges. The court stated:

> The Act requires substantial scrutiny of religious institutions. The degree of resulting entanglement, however, is diminished by the fact that the institutions are colleges rather than elementary or secondary schools and none of the approved

> schools is pervasively sectarian. In Roemer, the Court held that a relationship between the state and church-related schools, which was very similar to that involved here, did not constitute excessive entanglement. (432 F. Supp. 971, 980 (1977))

In summary, the decision in Lendall v. Cook reviewed many of the parameters established by earlier Supreme Court decisions. The three-tiered test and guidelines developed in the state level decision of Americans United for the Separation of Church and State v. Bubb were used in the denial of the plaintiffs' case. The Scholarship Program of Arkansas had stayed within the guidelines established earlier and was declared a constitutionally valid program.

California

In California Educational Facilities Authority v. Priest, 526 P.2d 513 (1974), the California Supreme Court ruled on a case that was similar to Hunt v. McNair on the federal level. The California Educational Facilities Authority Act had established the authority to:

> Expand, enlarge and establish dormitory, academic and related facilities. Under the terms of the Act, the Authority may use the proceeds generated by its bond sales to construct or rehabilitate dormitories and other educational facilities at participating private colleges and universities. (526 P.2d 513, 515 (1974))

Projects could include facilities used for academic or extracurricular functions but excluded funds for facilities used for religious activities

or training. The authority was granted broad powers over the construction of projects including location. The act did not give the authority the right to tax with the allowable bonds being defined as an obligation of the authority. The bonds and their interest would be paid out of revenue from the projects. The act limited sales of bonds to $150,000,000 with the individual colleges being given the responsibility for the operation of the projects (Howard, 1976, p. 128).

The plaintiff claimed that this act and related aid to the Univeristy of Pacific was in violation of the Establishment Clause of the Federal First Amendment and various sections of the California constitution. The California Supreme Court utilized the three-tiered test outlined in Hunt v. McNair, a case involving a similar act in South Carolina. In a parallel decision, the California court found the legislative purpose to be distinctly secular. The objective of providing expanded college opportunities was viewed as a legitimate secular goal.

The court noted that in the case of the University of Pacific, the primary effect was not one of advancing religion. This college was not affiliated with any religious organization and the act contained "an explicit limitation that participating colleges may neither restrict entry on racial or religious grounds nor require students gaining admission to receive instruction in the tenets of a particular faith" (526 P.2d 513, 518 (1974)). The excessive entanglement question was dismissed because the Court felt that the State's authority to inspect projects at sectarian colleges did not constitute endangering

entanglement. The operation of the facilities had been left to the individual institutions.

In regard to the Constitution of California, the State Supreme Court did not find any violations. The religious neutrality necessitated by Article 1, Section 4 was not violated since there was no infringement on the free exercise of any individual or favorable treatment of any religion. Article IX, Section 8 prohibited public funds from being appropriated for the support of any sectarian college. Since there was no expenditure of public funds nor utilization of the state's credit, the court found no violation with this restriction. Article XIII, Section 24 specifically prohibited the legislature, any county or municipal corporation from making an appropriation or paying public funds to a sectarian college or university:

> The provision was intended to insure the separation of church and state and to guarantee that the power, authority, and financial resources of the government shall never be devoted to the advancement or support of religious or sectarian purposes . . . Under this section, the fact that a statute has some identifiable secular objective will not immunize it from further analysis to ascertain whether it also has the direct, immediate, and substantial effect of advancing religion . . . This section has never been interpreted, however, to require governmental hostility to religion, nor to prohibit a religious institution from receiving an indirect, remote and incidental benefit from a statute which has a secular primary purpose. (526 P.2d 513, 520-21 (1974))

The Court found the aid in this act to be too remote and indirect to violate this section of the state constitution. The court relied on the legislature to identify the public purpose and devise a program that advanced public ends and did not excessively support religious

activities. Other potential constitutional objections with the California statute were dismissed as not being relevant.

In summary, the California Supreme Court relied heavily on the decision of Hunt v. McNair. The precedent set by the Supreme Court in this earlier case enabled the California court to deny the plaintiff's arguments. Hunt v. McNair had enhanced a specific type of aid and California's program had stayed within the mandated parameters.

Connecticut

Tilton v. Finch, 312 F. Supp. 1191 (1970) ruled on the State of Connecticut's participation in the 1963 Federal Higher Education Facilities Act which included aid to church-related colleges and universities. The Connecticut state plan had neither included or excluded state related colleges but authorized grants to institutions of higher learning. These institutions were required to be non-profit, accredited and legally authorized by the State of Connecticut. Construction of facilities for religious worship or departments of divinity was forbidden.

The constitutionality of Connecticut's state plan was challenged on the basis of conflict with the Establishment Clause of the First Amendment and the free exercise clause of the United States' Constitution. In terms of the Establishment Clause, the plaintiffs relied on two cases on the primary and secondary school, Everson v. Board of Education and Board of Education v. Allen. Although rejecting the arguments, the

court did not utilize the tests of secular purpose and primary effect developed in these cases and Lemon v. Kurtzman. In terms of the first challenge:

> We find that it clearly meets the first requirement of a secular legislative purpose. The purpose of the act appears on its face. It contains a congressional declaration that the policy underlying the act is to increase student enrollment capacity of the Nation's institutions of higher education through grants for construction of academic facilities to help provide young people with the greatest possible opportunity for higher education. (312 F. Supp. 1191, 1197-98 (1970))

According to the court, the act also met the second requirement of a primary effect that neither advances or inhibits religion. The plan had been drafted to exclude the construction of sectarian facilities.

The second contention of conflict with the free exercise clause or compulsory taxation for religious purposes was also rejected by the Court.

> Since the act has a secular legislative purpose and a primary effect which neither advances nor inhibits religion, it cannot be said to effect taxation for religious purposes. Moreover, a legislative enactment does not abridge the free exercise clause unless it has a coercive effect on an individual in the practice of his religion. Plaintiffs have not shown that the Act coerces them as individuals in the practice of their religion in any way. (312 F. Supp. 1191, 1199 (1970))

The court reviewed the development of the Connecticut participation in the federal Title I grant program that had been authorized by the Higher Education Facilities Act. The Connecticut state plan and actions

of the Connecticut Commission of Higher Education had functioned in accordance with the federal guidelines. The types of facilities constructed also adhered to the state and federal secular use restrictions. For example, Sacret Heart University built a new library, Annhurst College constructed a new music, drama and arts building, Fairfield University erected a new library and science building and Albert Magnus erected academic and administrative buildings.

In summary, Tilton v. Finch reviewed on a state level aid that had been developed on the federal plane. The Federal District Court used two of the guidelines of the three tiered test. These concepts of secular purpose and primary effect had been developed through Supreme Court decisions. Since the Connecticut plan adhered to the required federal guidelines for aid under the Higher Education Facilities Act, this court had little conflict in declaring the Connecticut plan constitutional and legal.

Georgia

In 1971, the General Assembly of Georgia enacted a program that would provide up to $600 per year to graduate and undergraduate students at private colleges and universities. Students studying toward degrees in theology, divinity or religious education were excluded. Institution's whose academic program was principally sectarian were also excluded.

In 1972, the Georgia Attorney General evaluated the program to note any possible unconstitutional aspects. After an "admittingly vague definition of principally sectarian instruction as a curriculum composed primarily of courses designed to teach a particular religious doctrine, the opinion weighed the federal and state constitutional aspects of the aid" (Howard, 1976, p. 222).

The Attorney General concluded that the program was not in conflict with any segment of the three-tiered test. The purpose was secular since it was to ease the burden on public institutions and the state's taxpayers. The primary effect of the program was defined as not fostering religion since the students, not the colleges, would receive the money. Since the state audits were strictly limited to verification of enrollment and eligibility, there was no excessive entanglement.

In regard to the provisions of the Georgia Constitution, the Attorney General concluded that the act did not aid, directly or indirectly, any sectarian institution since the statute excluded from participation any students attending these types of institutions. Furthermore, "the program had been adopted pursuant to the constitutional amendment which became Article VII, Section 1, paragraph 2, authorizing grants to students at nonpublic colleges" (Howard, 1976, p. 223).

In summary, the Attorney General concluded that the tuition grant program of Georgia complied with the restrictions of both the federal and state constitutions. The Attorney General did acknowledge that only the courts could finally rule on the validity of this program. After this ruling, the program was put into effect.

Illinois

The decision in Creole v. Illinois Educational Facilities Authority, 268 N.E.2d 299 (1972), ruled on the legality of the Illinois Educational Facilities Authority Act. This act established the above named authority which was empowered to issue revenue bonds to "acquire, furnish or equip educational facilities for lease to private institutions of higher education" (268 N.E.2d 299, 400 (1972)). A private college or university was defined as not for profit institution which did not discriminate in the admission of students on the basis of race, color or creed. The college must be accredited and have a program that, at least, led to a two year degree. The authority could finance a wide range of buildings as long as none of the funds went for property involved in sectarian instruction, religious worship or a department of divinity. The bonds were to be paid from the income of the projects with the facilities being leased to the institutions. The funds used would not constitute a state debt. The "statute follows the pattern of state authorized revenue bond financing of buildings for private colleges and universities that has been employed in several states" (268 N.E.2d 299, 400 (1972)).

The plaintiffs claimed that the aid granted Lewis College was unconstitutional. In August, 1971, the Illinois Educational Facilities Authority had contracted to support the financing and construction of an aviation maintenance instruction facility. The college was a Roman Catholic institution under the direction of the Christian Brothers. After receiving $286,041 from the United States Department of Health Education and Welfare, the college had requested $930,000

from the state authority. The act was challenged on the provisions of the U.S. First Amendment and Section 3 of Article X of the 1970 Illinois Constitution which stated:

> Neither the General Assembly nor any county, city or town, township, school district or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarial denomination whatever; nor shall any grant or donation of land, money or other personal property ever be made by the State, or any such public corporation to any church or for any sectarian purpose. (268 N.E.2d 299, 401 (1972))

The court utilized the three-tiered test. The sectarian purpose aspect was met since the General Assembly had attempted to maintain and improve the quality of higher education in the state. Since the facility had been religiously neutral and was on the less vulnerable level of higher education, there was no conflict with the primary effect test. In terms of excessive entanglement, the

> likelihood of a violation of that provision of the statute seems remote, for the institution would have little to gain but much to lose by failing to comply with the statute. The degree of supervision required would be minimal, and does not operate to invalidate the main scheme of the statute. (268 N.E.2d 299, 403 (1972))

The majority did find conflict with the Article X, Section 3 of the Illinois Constitution. The court noted illegality on the state level with the authorization of public funds to construct a building for a sectarian college. This funding eliminated:

> the one time aspect relied upon to sustain the grant in the Tilton case. The potential for entanglement in a long range relationship of debtor and creditor is great, for in the event of default the bondholders are authorized to apply for the appointment of a receiver to operate the facility. This defect does not invalidate the entire statute, for the provision authorizing the investment of public funds in the revenue bonds issued by the Authority is clearly severable" (268 N.E.2d 299, 404 (1972))

In summary, the Illinois Supreme Court found that the Illinois Educational Facilities Authority Act complied with all state and federal restraints except for Article X, Section 3 of the State Constitution. If this act was redesigned to omit the use of public money to finance the construction, the program could be resubmitted and probably pass the various constitutional tests.

Kansas

The District Court of Kansas ruled on another tuition grant plan in Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 892 (1974). This case involved a Kansas statute providing tuition grants to college students at private institutions within the state. To be eligible, each college had to be private, accredited by a regional accrediting association and admit students without regard for race, sex, religion, creed or national origin. Individual students were notified of an awarded amount with the funds going directly to the attended school. Nineteen church related schools took advantage

of the act that was challenged on the Fourteenth Amendment equal protection grounds and through the First Amendment's establishment and free exercise clauses (Smith, 1975).

In terms of the equal protection concept, the court noted that students at public colleges already received state aid. The state would not be excessively subsidizing private students and creating unequal advantage to this group. In terms of the Establishment Clause, the court found no conflict in the secular purpose of the three-tiered test. The decision noted that the stated purposes of saving state funds by using private facilities and faculties and offering students assistance to attend schools of their choice was sufficiently secular. The primary effect of the tuition grants program was evaluated at each of the nineteen colleges. In order to evaluate the religious entanglement of each institution, eight standards were applied:

1. Religious restrictions on student admission.
2. Explicitly or implicitly required attendance of students at religious activities.
3. Required obedience by students to specific doctrines or dogmas.
4. Required attendance in theological or sectarian courses.
5. Degree to which the colleges were a part of their respective sponsoring denomination.
6. Extent to which colleges sought to indoctrinate students with their religious values.
7. Imposition of religious restrictions on faculty appointments.
8. Religious restrictions on what or how the faculty taught.

The court concluded that fourteen of the nineteen colleges had met a sufficient number of the guidelines to be defined as not having a "primary sectarian mission." Many of these colleges did have some religious functions but only five were disqualified. The court noted that these institutions could become eligible by eliminating the offending practices (Howard, 1976).

In terms of excessive entanglement, the District Court concluded that the law met the proper criteria. Since the act granted the tuition to the students, the court found little risk of administrative entanglement. The fact that the statute did not require surveillance, did not define how the funds should be used and there was a diversity of students and faiths at the eligible campuses reinforced the lack of excessive entanglement arguments (Smith, 1975).

Although the aid in this case was ruled acceptable by the District Court, the decision did not deal consistently with the question of the state funds being used for secular purposes. In contrast to Roemer v. Board of Public Works where the broad based aid was limited to non-secular activities, this decision acknowledged that a portion of the funds could be used for religious activities. This was not viewed as a constitutional violation as long as the participation was voluntary. The court noted:

> There is no way we can be sure that the students will not take part in religious activities. We do not believe, however, that the tuition grant program is unconsitutional because some recipients become involved in religious activities. . . . The opportunity is there for religious participation but the degree of involvement depends totally upon the student. Religious participation is voluntary and is thus distinct from the education received at these church schools. (379 F. Supp. 892, 892 (1974))

Once an institution was defined as sufficiently secular, the destination of the funds was not debated. This court viewed the use restriction as a formality. This program can be contrasted with Roemer v. Board of Public Works of Maryland where the use of aid was restricted but required a governmental check that could foster excessive entanglement (Howard, 1976). The possible illegality due to a lack of sectarian use restriction can be resolved if a similar type tuition grant program is reviewed by the Supreme Court. In the absence of review by the Supreme Court, the broadened interpretation established on the District Court level will stand.

Missouri

In Americans United v. Rogers, 538 S.W.2d 711 (1977), the Missouri Supreme Court ruled on the state's tuition grant program. The plan had been enacted in 1972 with the aid being financial assistance to qualified full-time students to receive nonreligious education at public or private colleges. Approved private institutions were defined as non-profit colleges located in Missouri which were operated by an independent board; provided instruction leading to at least a two-year degree; were accredited by the North Central Association of Colleges and Secondary Schools and did not discriminate in hiring or admission. In order to be eligible for aid, students had to be residents of Missouri, enrolled as a full-time undergraduate and meet the financial

need criteria. The annual limits of each grant were one half the tuition and fees charged by the attended institution or $900. Payment was made directly to the student. The program was directed by the Coordinating Board of Higher Education. During the 1975-75 fiscal year, 10,000 college students received financial aid. The Coordinating Board for Higher Education approved fifty seven institutions with thirty one of them being private.

The plaintiffs had challenged the constitutionality of the program on the basis of conflicts with the U.S. Constitution's First Amendment and various provisions of the 1945 Missouri Constitution. In terms of the challenge to the establishment clause of the First Amendment, the court relied on the three part test enunciated in Lemon v. Kurtzman and further refined in Hunt v. McNair and Roemer v. Board of Public Works of Maryland. The later case involved a program similar to this one. In relation to the secular purpose test, the court quickly agreed that there was no conflict. The potential primary effect conflict was likewise dismissed. The discussion of possible excessive entanglement was more lengthy although the outcome was the same. The court stated:

> Under the statute now challenged, institutional involvement (with the state) is limited to verification that the student is actually in attendance at the particular school and repayment to the board of any refund due upon transfer or withdrawal of a student. The later would appear to be less involved than the reporting under the statute of Maryland in the Roemer case . . . Excessive entanglement does not arise necessarily because the challenged plan call for annual legislative appropriations and political divisiveness is diminished, if not eliminated, when student eligibility does not turn on whether or not a public or private institution is attended. (538 S.W.2d 711, 718 (1977))

Of all the potential conflicts with the State Constitution, the Court found Article IX, Section 8 of particular interest. This clause prohibited the appropriation of public funds to support any private school. After a lengthy discussion, the court concluded that "the language of the Act is clear and explicit in providing that the Program is designed and implemented for the benefit of the students, not of the institutions, and that the awards are made to the students, not the institutions" (538 S.W.2d 711, 720 (1977)).

In summary, the Supreme Court of Missouri used a number of federal court precedents to reverse a lower court decision. Due to the strict limitations of the program and the previously established guidelines, the Court had no difficulty in rejecting the various challenges to Missouri's Tuition Grant Program.

In Missourians for the Separation of Church and State v. Robertson, 592 S.W.2d 825 (1979), the Missouri Court of Appeals ruled on a case brought against the Commissioner of Higher Education and other state officials and the institutions benefiting from the state's Financial Assistance Program. This program was established in 1972 "to enable qualified students to receive money grants for nonreligious instruction in an approved public or private college of choice" (592 S.W.2d 825, 830 (1979)). The Coordinating Board for Higher Education was given power to administrate and establish rules and regulations for the program. An approved private institution was defined as being nonprofit, located in Missouri, providing instruction that at least leads to a two-year degree, accredited by the North Central Association of Colleges and Secondary Schools, nondiscriminating in hiring or admission on the basis of race, color, religion, sex or national

origin and permitted the faculty to select textbooks without pressure. At the time of the case, twenty-nine private and twenty-six public institutions had been approved by the Coordinating Board for Higher Education.

In the 1976 case of Americans United v. Rogers, the program was declared valid with a secular purpose. This case "expressly withheld decision as to which of the schools cited--if any at all--failed the statutory qualifications for approval" (592 S.W.2d 825, 831 (1979)). In this later action, the plaintiffs claimed that the program was administered in an unconstitutional manner.

In 1976, the Coordinating Board for Higher Education had a meeting with Assistant Attorney General Iverson to evaluate the criteria used for determining the approval of a college or university. The Assistant Attorney General stated that the seventeen approved institutions challenged in Americans United v. Rogers should be reevaluated. Criteria to be used included independent boards, non-discriminatory policies with respect to hiring administrators, faculty and staff and admission of students and academic freedom for faculty to select textbooks impartially.

The administering board reevaluated seventeen colleges and found eight in accordance with the new criteria. The nine others were informed by letter of a meeting where they would be given an opportunity to prevent any other evidence. Four of the institutions were approved in the month prior to the formal hearing.

The plaintiffs claimed that the program aided colleges that were based on sectarian religions or gender discrimination in violation of

the guidelines of the program itself. The administrative practice which determined approval of an institution was perceived as illegal.

The Missouri Court of Appeals upheld the legality of the program's procedures. The legislature "expressly delegates to CBHE authority to promulgate rules and to determine financial need and qualification of a student for the grant of tuition and status of approved institution for student assistance" (592 S.W.2d 825, 841 (1979)). The court agreed that the ad hoc or revised 1976 method of approving institutions did not violate the charter of the commission or the prohibitions against religious or gender non-discrimination of the original statute of 1972. The Appeals Court did rule that the issue of gender discrimination was valid in regard to one of the defendants, the Wentworth Military Academy. In this specific case, the petition of the plaintiffs were reinstated and remanded for further proceedings.

In summary, the plaintiffs attempted to have the Missouri Financial Assistance Program declared invalid due to administrative irregularities. The court had previously ruled positively on the validity of the program as a whole. At this time, the Court of Appeals accepted only one periferal argument of the plaintiffs. This resulted in the reevaluation of one approved school. Otherwise, the program withstood the legal challenge.

Nebraska

In Rogers v. Swanson, 219 N.W.2d 726 (1974), the Supreme Court of Nebraska ruled on the legality of Legislative Act number 1171 which provided for public grants to students in need of tuition aid to attend private colleges. The grants were limited to residents who were admitted to or in residence as full-time students in private colleges. The students had to have enrolled in the college within five years of high school graudation, be registered in an academic type program and not be pursuing a theology or divinity degree.

In Article III, Section 18, the Constitution of Nebraska "prohibits the granting to any corporation, association or individual any special or exclusive privileges, community or franchises whatever" (219 N.W.2d 728, 733 (1974)). The decision ruled that the tuition aid program violated this provision of the State Constitution since both the class of students eligible and the class of institutions were restricted and accorded special privileges. Article VII, Section 11 of the Constitution of Nebraska prohibited appropriations being made directly to private colleges. The court concluded that this aid would directly aid the private institutions. In Section 1 of the act, this intent was noted:

> The independent institutions of this state have the capacity to handle more students without increasing faculty or facilities and can do so at a reduced cost to this state with the help of tuition grants. (219 N.W.2d 726, 733 (1974))

In terms of the First Amendment of the U.S. Constitution, the Supreme Court of Nebraska found the act unconstitutional under the

Establishment Clause. Since the only attempt to restrict the use of the funds was the exclusion of students working toward divinity degrees, the court declared excessive entanglement. There had been no attempt to restrict the use of the funds to sectarian purposes. The sectarian and secular coursework were found to be so intertwined in the tuition grants that the court found a violation of the Establishment Clause. While Nebraska's attempt at a tuition aid program could have been rewritten to overcome the First Amendment conflicts, the contradictions with the State's Constitution would have been difficult to overcome without an amendment.

New Jersey

Clayton v. Kervick, 244 A.2d 281 (1968), and 285 A.2d 11 (1971) are two cases involving the New Jersey Educational Facilities Authority. The protagonists in both cases were plaintiff Joseph E. Clayton, Acting Commissioner of Education, and defendant John A. Kervick, State Treasurer. In 1966, New Jersey had established the Educational Facilities Authority which was given the power to borrow money and issue bonds. These bonds were defined as not being "a debt or liability of the State or of any political subdivision thereof or a pledge of faith and credit of the State or of any subdivision" (244 A.2d 281, 282 (1968)). In relation to private colleges, the authority was given the power to construct projects for these institutions' benefit and

make loans to these colleges. The 1966 statute appropriated $250,000 for this and the next fiscal year. In 1967, the Acting Commissioner of Education requested that the State Treasurer forward $100,000 for preliminary planning. The State Attorney denied the request citing the possibility of legal and constitutional conflicts. The Commissioner and Authority filed a complaint to have the money released and act declared valid.

The Superior Court of New Jersey agreed with the trial judge's decision. The court concluded that the authority had been created for the benefit of the public, that the annual rentals involved non-legislative appropriated funds and that the legislative plan did not violate the debt limitation clause of New Jersey's constitution. The inclusion of private sectarian colleges did create constitutional conflicts but the court, once again, agreed with the trial judge who had concluded:

> I am intended to believe that the Legislature dealing with the public purpose of higher education intended the act to operate as far as it could constitutionally be done . . . Just because it lumped all colleges, public, nonsectarian and sectarian and private colleges into one act shouldn't cause the entire act to fail. I don't see any difficulty in administering the act if any one of the three groups be eliminated. Considering the broad language of the severability clause, it is my conclusion that the act is severable. (244 A.2d 281, 285 (1968))

The Superior Court concluded that the program could continue in all aspects that were valid and that certain groups of colleges could be eliminated from the aid program.

After the Federal Supreme Court decisions in Lemon v. Kurtzman and Tilton v. Richardson, the appeal in this case was remanded to the Superior New Jersey Court. After the guidelines established in the higher level decisions, the New Jersey court analyzed the Educational Facilities Authority Law in relation to the three tiered test. The court agreed that the legislative purpose was completely secular. In terms of the question of primary effect being one of aiding religion, the court noted no conflict since the new facilities could never be used for sectarian purposes. The discussion in Tilton v. Richardson contained a debate of when a sectarian college could be defined as ineligible for aid. The court concluded:

> No college may participate if it restricts entry on racial or religious grounds or requires all the students gaining admission to receive instruction in the tenets of a particular faith. We are unable to say whether other religious precepts or practices unrelated to the immediate use of a facility will also disqualify a college. The disqualification of colleges . . . will not affect the continued validity of the statute. (285 A.2d 22, 29 (1971))

In evaluating the excessive entanglement question, the court began with the premise that there already was considerable entanglement between the state and sectarian colleges. The possible entanglement with the restricted, secular use of the educational facilities was dismissed since this type of interaction was condoned in Tilton v. Richardson. Since the Educational Facilities Authority did not plan to operate or manage the projects, the possibility of excessive entanglement was lessened.

In summary, the challenge to the Educational Facilities Authority Act resulted in two rulings by the Superior Court of New Jersey. In both cases, the court concluded that the statute met the guidelines for validity. A series of Federal Supreme Court decisions granted the lower court a number of valuable guidelines that enhanced the decision.

New York

In New York State, the Constitution contains a number of provisions about the appropriation of funds to the private sector. In Article VII, Section 8, funds used for educational purposes are exempt from the prohibition of loaning funds to private corporations. Article VIII, Section I provides for the authorization of aid to charitable institutions by counties, cities or towns while Article XI, Section 3 prohibits state aid directly or indirectly to an institution under whole or part control of a religious denomination. This section is also known as the Blaine Amendment.

The flexibility of these provisions enabled the New York State legislature to enact programs such as tax exempt bonds for building construction direct assistance through the funding of specific colleges at private universities (Olliver, 1975). The most significant undertaking by the legislature is the Bundy Aid Program. This plan was developed in response to the Report of the Select Committee on the Future of Private and Independent Higher Education in New York State

and was chaired by McGeorge Bundy. The "Bundy Report" called for the continued growth of and financial aid to both the public and private sectors.

In 1968, the New York State Legislature enacted Section 6401 of the Education Law. This legislation provided for unrestricted aid to private institutions based on the following formula: $400 for each bachelor's and master's degree and $2,400 for each doctoral degree.

The restrictions on eligibility of a college parallel those in the State Constitution. Colleges which are under the control of a religious denomination or engaged in the teaching of a denominational doctrine are not eligible to receive funds from the State. As a requirement for eligibility under Section 6401 of the Educational Law, the following statements had to be submitted to the State Education Department:

1. What are the stated purposes of the institution?
2. Is the institution wholly or in part under the control or direction of any religious denomination?
3. Does the institution receive financial assistance from any religious body?
4. Do the policies of the institution with respect to the selection of members of its governing board, its administrative officers or its faculty provide that the faith or creed of a candidate shall be relevant in any way to his selection?
5. Do the policies of the institution with respect to the admission of students provide that the faith or creed of an applicant shall be relevant in any way to his admissibility to the institution?

6. Do the policies of the institution with respect to the awarding of scholarship, fellowship or other financial assistance to its students provide that the faith or other financial assistance to its students provide that the faith or creed of an applicant shall be relevant in any way to the awarding of such assistance?

7. Is any denominational tenet or doctrine taught in the institution?

8. Does the institution award any degree or degrees in the field of religion?

9. Does the institution include within its structure or is it affiliated with any seminary or school of theology?

10. What is the place of religion in the programs of the institution?

11. Do the policies of the institution with respect to the use of any institutional facility or program by others than the staff, faculty and student body provide that the faith or creed of an individual applicant, or the denominational affiliation of an organizational applicant is relevant in any way to the granting of such use?

12. Has the institution filed with the State Education Department a Certificate of Religious or Denominational Institution pursuant to Education Law section 313?

13. Is there any other information which the institution deems pertinent to a determination of its eligibility for state aid under the constitutional provisions referred to above?

Other rules for eligibility include that an institution be a non-profit college or university incorporated by the Board of Regents or State Legislature, maintain one or more degree programs resulting in an associate or higher degree and be accredited by an appropriate nationally recognized accrediting association (New York, 1979). As a result of the restrictions decreed by the act, a number of institutions dropped specific affiliations or sectarian activities to be eligible to receive state funds.

The enactment of the Bundy Program with direct aid to private institutions resulted in a number of court cases in the early 1970's. These decisions helped define what types of colleges are eligible under the program. In Iona College v. Nyquist, 316 N.Y.S.2d 139 (1971), the college sued the New York State Commissioner of Education who had ruled that the institution was ineligible for state funds under the established guidelines and constitutional restrictions. The Commissioner had ruled Iona College ineligible because it had characterized itself as a Catholic institution in a questionnaire, claimed a strong religious commitment in the school's catalog and had a Board of Trustees, President and significant number of administrators from the sponsoring religious order (Blanton, 1978).

New York's Supreme Court ruled in favor of the Commissioner of Education on the basis of the New York State Constitution which disallows aid to an institution of learning that is wholly or partially under the control or direction of a religious denomination. In conclusion, the court stated that the "procedure used by the Commissioner to obtain information was reasonable and that Iona was given ample opportunity to present its case" (316 N.Y.S.2d 139, 144 (1971)). In response to this decision, Iona College altered its sectarian basis and became eligible for aid in fiscal year 1972-73.

In Canisius v. Nyquist, 320 N.Y.S.2d 652 (1971), the Court of Appeals of New York declared Canisius College ineligible for aid after the Appelate Division of New York had ruled the college eligible. The Commissioner of Education had ruled Canisius College ineligible on the basis of the following facts:

> That the College states, in its current catalog that the commitment of Canisius College to the pursuit of wisdom involves finally strong religious convictions, a dedication to Christ and His teachings; five of the twelve trustees, the president of the College, one-third of the administrative officers and twenty percent of the faculty are members of the sponsoring religious order; all students who profess adherence to the Roman Catholic faith are required to complete twelve credit hours in courses in religious studies; college-sponsored religious services are exclusively Roman Catholic in style, all college chaplains are members of the sponsoring religious order and the two religious organizations on campus are Roman Catholic related. (320 N.Y.S.2d 652, 654 (1971))

Originally, the Appellate Court found that the ruling of Canisius College being ineligible for aid was "arbitrary and capricious where the college's department of religious studies offered strictly academic disciplines and had faculty of various religions, no degrees were awarded in the field of religion and no denominational tenet or doctrine was taught in the manner of dogmatism or indoctrination" (320 N.Y.S.2d 652, 652 (1971)). In analyzing the purposes and practices of the college, the court concluded that this institution did not teach any religious doctrine with sufficient strictness to fall under the Blaine Amendment's concept of indoctrination. Interpretation of what is the teaching of a denominational tenet or doctrine was defined as one of degree:

> It is agreed that most, if not all, institutions of higher learning in New York State offer courses in religion, and it is conceded that State aid under section 6401 has been approved for such institutions. To literally interpret the provision of the Blaine Amendment that any . . . institution . . . in which any denominational tenet or doctrine is taught is prohibited from State aid, would be absurd, since it would eliminate from State aid almost all private institutions, as well as some of the schools of the State University. (320 N.Y.S.2d 652, 653 (1971))

This court noted that Canisius College would need to be eligible under the federal constitution and determined that the primary purpose of Section 6401 of the Educational Act was a secular one assisting private colleges in providing better education for its student bodies.

In a one page decision, the Court of Appeals of New York reversed the ruling by stating that "the commissioner had reasonable basis for his determination" (320 N.Y.S.2d 652, 655 (1971)). The justices stated that the commissioner should renew the ruling if Canisius submits a new application. The college changed its governance and religious teaching factors and became eligible for state aid.

A third case pertaining to the Section 6401 of the Education Act was decided by the Appellate Court in 1971. In College of New Rochelle v. Nyquist, 326 N.Y.S.2d 765 (1971), this court overruled the decision of the Commissioner of Education by declaring that the College of New Rochelle was eligible for aid. Since the decision was not overruled by the higher Court of Appeals, this institution did not have to change its workings to be eligible for state funds. Similarly to Canisius, arguments in this case centered around the interpretation of the Blaine Amendment and excessive entanglement of the state with religion which would violate the First Amendment.

In discussing the Blaine Amendment, the Court directly restated what was noted in the first Canisius decision. The amount of doctrinaire teaching was not sufficient to disqualify the college from receiving aid. The religious courses taught at the college did not differ from those at secular institutions (Olliver, 1975). In terms of governance, the College was administered by the Community of Ursuline

Nuns who comprised a substantial minority of the Board of Trustees and approximately one-third of the faculty. The court stated:

> The question is whether the College was controlled or directed by a religious denomination so as to inculcate or attempt to inculcate the doctrine and faith of the denomination. We find upon an analysis of the record considering the totality of the circumstances, that this is not the case and for the Commissioner to so hold would be unsupportable. Therefore, since his conclusion cannot be based upon either clause of the Blaine Amendment, for him to hold the New York State Constitution proscribed State aid to the College was arbitrary and capricious. (326 N.Y.S.2d 652, 772 (1971))

The question of excessive entanglement in regard to the First Amendment was also interpreted as one of degree. The court noted a need for close scrutiny to analyze potential excessive entanglement but realized that total separation was not possible. The difference between the religious experience at pre and post secondary school was reviewed. In conclusion, the "evidence shows an institution with admittedly religious functions but whose predominent higher educational mission is to provide their students with a secular education" (326 N.Y.S.2d 652, 775 (1971)).

The three cases discussed issues on the state level that were similar to those discussed in the federal courts. The key issue was that of legality in relation to the State Constitution of New York, specifically the Blaine Amendment. Those institutions that did not comply with the Blaine Amendment were able to modify their governance to comply at a later date. In conclusion, New York State has developed a program that directly aids private institutions of higher education. The use of funds is not restricted. The previously mentioned

legal decisions and the lack of consensus point out the difficulty in interpreting what institutions are eligible to receive aid.

North Carolina

In Smith v. Board of Governors of the University of North Carolina, 429 F. Supp. 871 (1977), the eligibility of two instate colleges for participation in the State's tuition grants and scholarship program was reviewed. The plaintiff claimed that Belmont Abbey College and Pfeiffer College were so pervasively sectarian that the aid was in violation of the First Amendment. A distinction was made between these colleges and other church-related institutions such as Duke University. The educational experience at Duke University was viewed as sufficiently secular.

Two statutes were involved in the decision. In 1971, funds were granted to private instate colleges on the basis of full-time North Carolina residents enrolled. These funds were distributed by the North Carolina Board of Higher Education. Participating colleges had to be accredited by the Southern Association of Colleges and Schools and could not be a Bible college or pervasively religious institution. In 1975, an amendment to this statute limited the use of the funds to sectarian education. The following year, another amendment required each college to maintain a separate account for the funds.

In 1975, a tuition grant program that directly aided the students attending instate, private colleges was enacted. The State Educational

Assistance Authority was authorized to grant $200 per academic year to each state resident attending an accredited college on a full-time basis. The funds were forwarded to the participating institutions which credited each student's account. The funds were restricted to secular educational purposes with students enrolled in religious education studies not eligible for participation in the program.

After a lengthy analysis of the educational experience at Belmont Abbey College and Pfeiffer College, the Supreme Court of North Carolina concluded that there was not a significant difference between these two colleges and those analyzed in Roemer v. Board of Public Works of Maryland. Although having a presence of religion, both colleges were basically liberal arts schools that were defined as not being pervasively sectarian. The decision noted that the statutes served the State's secular purpose in assisting North Carolina residents to attend the colleges of their choice. The possibility of the funds freeing other college money for sectarian purposes was dismissed since the Supreme Court decision in Roemer v. Board of Public Works of Maryland had nullified a similar claim. Since the aid was directed at students and the funding required minimal state supervision, there was little prospect of excessive governmental entanglement.

The Supreme Court of North Carolina concluded:

> Having concluded that these two colleges are not pervasively sectarian, that the state's purpose in providing the assistance is a secular one and the use of the funds is secular and that there is no excessive entanglement of the state with religious activities, we conclude that these programs are unassiable under the First Amendment of the Federal Constitution. (429 F. Supp. 879 (1977))

Oregon

In 1968, the Attorney General of Oregon considered whether the State could "provide financial assistance to students attending private institutions of higher education in Oregon and whether the state could give financial aid to a student on the condition that the student attend an in-state private institution of higher education" (Howard, 1976, p. 721). The Attorney General felt that the first type of aid was acceptable while the second could not be justified legally. Use of public funds for scholarships was considered a public purpose by the State. Restricted private college student scholarships could be viewed as furthering public purpose.

The Attorney General then discussed the 1966 decision of Horace Mann League of the United States v. Board of Public Works of Maryland. The distinction between K-12 aid and funding on the collegiate level was stated as being significant (Olliver, 1975). The factors noted in this case to determine if an educational institute was sectarian were reviewed. In conclusion, this office noted:

> Since the question has not been adjudicated in Oregon, the tests for determining the sectarian characteristics of an institution as enumerated in the Mann case . . . are not necessarily the same tests that would be applied by the Oregon Courts. But we do find the reasoning of the case pursuasive and are inclined to view the same or similar tests would be prescribed by the judiciary of this state. (Howard, 1976, p. 723)

In a 1971 opinion in relation to contracts from the state to private, sectarian institutions, the Attorney General ruled that the state could not make payment of tuition grants to students attending these colleges

or the institutions themselves. The office did note that the Oregon Supreme Court had not established any guidelines to determine what should be defined as sectarian.

The State of Oregon had initiated a tuition equalization program in 1969. After the opinion of the Attorney General was granted, this program was replaced by one that accepted the restrictions noted by the Attorney General. Oregon Statute number 352.720 for the Purchase of Educational Services from Independent Colleges was enacted in 1971. This statute granted power to the Oregon Commission of Higher Education to enter contracts with private colleges and universities for the performance of non-sectarian educational services. These institutions could receive reimbursement of up to the cost of education for every forty five quarter hours of approved, nonsectarian coursework. Colleges could request funds for undergraduate students who were defined as being Oregon residents, not having obtained a baccalaureate degree, not completed more than one hundred and eighty quarter hours and not classified as a graduate student by the Oregon State Scholarship Commission or U.S. government program (Oregon, 1980a). The statute defined as eligible any "nonprofit college or university in the State of Oregon accredited by the Northwest Association of Secondary and Higher Schools, any hospital school of nursing and any chiropractic college located in this state and accredited by the Commission on Accreditation of the Council on Chiropractic Education" (Oregon, 1974, p. 754).

In summary, the General Assembly of Oregon was able to aid private but not excessively sectarian colleges by adhering to the guidelines

established by the Attorney General. While some of the variables of this program could have come under court scrutiny, neither the Attorney General's office or a private group have brought suit against the statute.

South Carolina

In South Carolina, the first attempt at a tuition support program for students attending private institutions was struck down by the State Supreme Court in 1971. In the following year, the Constitution of South Carolina was amended to allow direct support to colleges that were whole or partially under the direction of religious denominations.

In 1972, the State Legislature enacted a program to aid the state's nineteen private colleges. Under the previous tuition grant program, fifteen of these colleges had been declared ineligible. In terms of tuition grants, individual students could receive up to $1,500. The funds go directly to the students who are eligible on a combination of academic merit and financial need. The funds must be used within the State of South Carolina and only for tuition payment on the undergraduate level. If satisfactory progress is made toward a degree, the grant is renewable (South Carolina, 1981).

The tuition grants program originally established in 1970 was struck down in the State's Supreme Court in Hartness v. Paterson, 179 S.E.2d 907 (1971). The question at issue was the constitutionality

of Act number 1191 of the 1970 legislation in which South Carolina made funds available for students attending independent institutions of higher education. The act created a committee to administer the tuition grants and set requirements for eligibility. Any student enrolled in a divinity program was excluded. Twenty one colleges were considered for eligibility with sixteen of these having religious affiliation. The Supreme Court found this act in violation of the following portion of Article XI, Section 9 of the State's Constitution:

> The property or credit of the State of South Carolina, . . . , or any public money from whatever source derived, shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, directly or indirectly, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization. (179 S.E.2d 907, 908 (1971))

The program was viewed as benefiting the religious institutions and therefore in violation of the constitution. The Supreme Court was fearful of excessive entanglement due to the interaction of private college officials and General Assembly representatives on the program's administrative committee. As mentioned previously, a 1972 constitutional revision enabled the State to continue this program.

In Durham v. McLeod, 102 S.E.2d 202 (1972), the plaintiffs challenged the State Education Assistance Act of 1971, a South Carolina program of guaranteed loan for state residents. The State Education Assistance Authority had been authorized to issue bonds to be payable from repayment of student loans, federal grants and revenue income of the agency. Borrowers had to be residents of South Carolina but could

attend out of state eligible institutions. There were no restrictions on the course of study for each student.

The plaintiffs claimed that the act violated Article XI, Section 9 of the South Carolina Constitution which "prohibits the use of property or credit of the State, directly or indirectly in aid of any church or school" (102 S.E.2d 202, 203 (1972)). In a previous case, Hartness v. Patterson, the Supreme Court of South Carolina had held tuition grants to students attending private colleges and universities in violation of Article XI, Section 9. This previous act had directed public money to a number of church supported institutions of higher education. In the later program, the aid had been directed at students who were given a choice of which college to attend. Since the student loan fund was held in trust by the authority and no public money was involved, the Court felt that there was no conflict with Article XI, Section 9.

The court discussed whether the act had violated the primary effect test, the second part of the three-tiered test. The Supreme Court of South Carolina dismissed the claim of violation of this clause of the State and Federal Constitutions by stating:

> We find no merit in this claim. The Act is scrupulously neutral as between religion and irreligion as between various religions. It simply aids and encourages South Carolina residents in the pursuit of higher education, and leaves all eligible institutions free to compete for their attendance and dollars, neither advantaged or disadvantaged by the operation of the Act. (102 S.E.2d 202, 204 (1972))

In summary, the South Carolina Supreme Court rejected the supposed similarity between a broad based student loan program and a restricted

tuition grant program aimed at students attending private institutions. No constitutional conflict was found with the one question of the establishment clause noted by the plaintiffs.

South Carolina also authorized lower cost bonds for capitol improvements under the direction of the State's Educational Facilities Authority. This funding resulted in a series of court challenges that terminated with the U.S. Supreme Court's affirmation of the aid in Hunt v. McNair.

Through such cases as Harntess v. Patterson, Hunt v. McNair and Durham v. McLeod their related programs and resultant constitutional changes, the State of South Carolina was a pioneer in charting what types of aid to private colleges were permissible. These programs have balanced constitutional restrictions and practical considerations. The experiences in South Carolina helped define the types of aid that are legal.

Tennessee

In Americans United for the Separation of Church and State v. Dunn, 384 F. Supp. 714 (1974), the District Court for Middle Tenneessee applied a number of concepts developed through the Supreme Court decisions. The case involved a Tennessee statute providing tuition grants that would be paid directly to both public and private institutions for eligible students attending the colleges. The statute did not place

restrictions on secular versus sectarian use by the colleges (Private Colleges, State Aid, and the Establishment Clause, 1975). Eighty five percent of the funds received by the private colleges went to sectarian institutions.

The District Court noted the Supreme Court's three-tiered test but distinguished this case because the Supreme Court had not yet ruled on a case involving unrestricted funds. The District Court developed a different three-stage analysis. The first issue analyzed was that of the aid being directed to the school, not the students. According to Everson, "property restricted aid" to students was permissible under the Establishment Clause since it would only incidentally benefit religion. The District Court concluded "that the aid authorized by the Tennessee statute was not so restricted, basing its decision on the absence of restrictions in the statute, the facts concerning the operation of the program and the actual disbursements made thereunder" (Private Colleges, State Aid, and the Establishment Clause, 1975, p. 987).

The second part of the analysis examined whether the aid could be exclusively restricted to the institutions' secular functions without entangling the state in the institutional functioning. The type of aid upheld by the Supreme Court at this point had been restricted to secular use. Since Tennessee's act did not limit the use of the funds, the court could not determine the law's legality according to the higher court's rulings (Smith, 1975).

The basic difference between the District Court's analysis for this case and the Supreme Court's three part test was the absence of a

primary purpose inquiry. Since this section of the three-tiered test had been met in most cases, there was not a substantial difference between the District Court's and higher court's method of analysis. Since the District Court could not utilize the broadened permissibleness found in Roemer v. Board of Public Works of Maryland, the absence of some use restriction resulted in this state tuition aid program being ruled unconstitutional.

In Americans United for the Separation of Church and State v. Blanton, 433 F. Supp. 97 (1977), the Federal Court of Appeals reviewed a second tuition grant program of the State of Tennessee. In 1974, this court had ruled in Americans United for the Separation of Church and State v. Dunn that Tennessee's Tuition Grant Program was in violation of the Establishment Clause of the Federal First Amendment. Before the appeal reached the Supreme Court, the statute was amended and the higher court remanded the case to the lower court. Prior to the reconsideration, the tuition grant program was repealed and the Tennessee Student Assistance Program was enacted. This later program was ruled on in this case.

The Student Assistance Program forwarded state funds directly to the students rather than to the colleges or universities as under the first program. The basis for the award was on financial need and the student was required to attend an in-state public college, university or technical institute or a non-public institution that was accredited by the Southern Association of Colleges and Schools. The maximum award was limited to $1200 of the student's tuition and fees. The logistics, rules and regulations of the act were administered by the

Tennessee Student Assistance Corporation. No restrictions were placed upon the students' selection of college or university. In 1977 fiscal year, the General Assembly appropriated $750,000 which was matched by the federal government. The court did note:

> that the evidence adduced established that some, but not all, of the private schools whose students benefited from this program are operated for religious purposes, with religious requirements for students and faculty and are admittedly permeated with the dogma of the sponsoring religious organization. (384 F. Supp. 714 (1977))

In the first case, this Court had utilized the three part test and the distinction between direct and indirect aid to develop a decision. In this case, the Court had found the unrestricted nature of the funds given directly to church-related institutions as having the primary effect of advancing religion. The plaintiffs argued that the new Tennessee Student Assistance Program should be analyzed in a similar fashion. The district court ruled otherwise. In the first program, the students were required to use the state funds for tuition and fees. Under the later program, the scholarships could be utilized for any educationally related expense. The aid was defined as not being direct institutional aid.

After a lengthy discussion of a number of child benefit cases, the court drew parallels between this program and a South Carolina plan evaluated in Durham v. McLeod. The South Carolina Court had determined that a statute establishing a state agency to make and insure student loans regardless of institutions attended did not violate the South Carolina or United States Constitution. Similarly to the Tennessee

Student Assistance Program, the South Carolina plan did not place restrictions on the course of study or type of institution for eligible students. The South Carolina court found this to be "scrupulously neutral as between religion and irreligion and as between various religions" (384 F. Supp. 714, 717 (1977)). The Federal District Court concluded that the Tennessee program was, in a similar fashion, religiously neutral.

In summary, the Tennessee General Assembly solved the legalistic conflicts in the second tuition aid program. By providing unrestricted aid directly to eligible students, this later plan adhered to the concept of religious neutrality that was necessary for constitutional validity. The decision concluded that:

> The statute passes the relevant three-pronged inquiry, and the court finds that the program, on its face and in its application, does not offend the values protected by the Establishment Clause. (384 F. Supp. 714, 717 1977))

Texas

Texas has developed a tuition plan for the assistance of undergraduate and graduate students attending private colleges. This Tuition Equalization Grants Program was first enacted by the 1971 Texas Legislature. At the onset, Texas residents attending in-state private colleges could receive awards up to $600.

Prior to the enactment of this program, an opinion was asked of the Attorney General. In 1969, the office of the Attorney General

found no violation with the State Constitution and discussed the concept of primary purpose: "The tuition aid is provided to individuals so the benefit to a particular religion is indirect and remote as opposed to primary. There can be no doubt that it is in the public interest to provide for the education of the student citizens of this State" (Olliver, 1975, p. 388). The Attorney General's office did note a need in the bill to insure that no religious courses or activities were forced upon the recipients.

In 1972, the Attorney General was asked for a ruling in light of Tilton and Kurtzman. The office implied that the grants were constitutional in terms of excessive entanglement. The ruling noted the public purpose concept and federal rulings and stated that the program's constitutionality would have to be decided by a court for a final decision. In relation to the Supreme Court's rulings of 1973, the Attorney General cautioned against aiding schools that were sectarian and noted that the State of Texas's Constitution was more restrictive than the federal one. In order to become valid under the Texas Constitution, the program had to "avoid aid to sects; relevant to the investigation would be the characteristics of those to whom the grants are given, the institutions receiving them, and the uses to which the funds are put by the institutions" (Howard, 1976, p. 857).

The Attorney General outlined a series of restrictions which were incorporated in a revision of the regulations for the Continuing Board. The revised rules included: the prohibition of funds through the program for the benefit of any sect or seminary, the requiring of approved institutions to not discriminate on racial or religious basis

and the inclusion of a written student affirmation that stated the individual was not enrolled in a theological or religious degree program.

In 1974, the Attorney General's office was able to apply the above mentioned guidelines to question the eligibility of a participating college. This opinion declared as sectarian and ineligible for aid a college which required all faculty members to be members of a particular Christian faith (Howard, 1976, p. 858).

In conclusion, the State of Texas has developed a Tuition Equalization Program that, in the opinion of the Attorney General, has sufficient restrictions and guidelines to be constitutionally valid. Through a series of opinions, the specifications for eligibility were elaborated upon. While the program itself stands entact, the number of eligible colleges has declined.

Virginia

In Virginia, the amendment of the State Constitution made possible the development of a Tuition Assistance Loan Program. In 1971, Article VIII, Section 10 was amended to grant the General Assembly the authority to appropriate funds for educational purposes to Virginia resident undergraduate and graduate students in non-sectarian private schools. Article VIII, Section 11 was added to the Constitution. This article empowered the legislature to develop a loan program to

students attending private colleges whose primary purposes was to provide sectarian education.

In 1972, the General Assembly passed a Tuition Assistance Loan Program for "bona fide residents of Virginia who attend private, accredited and non-profit institutions of collegiate education in the Commonwealth whose primary purpose is to provide collegiate education and not to provide religious training or theological education" (McFarlane, 1973, p. 599). The program would be administered by the State Council of Higher Education and the annual average appropriation per full time equivalent was limited to the annual average appropriation at Virginia's public institutions. Students were limited to eligibility for four academic years and could repay the loan in money or academic work. If satisfactory progress was made by a student, the loan was considered to be repayed. If insufficient academic progress was made, the loan had to be repayed.

During the same session, Virginia's General Assembly passed a second, similar plan. This program developed means of assistance for undergraduate students at either public or private institutions and established the Virginia Grant and Loan Commission. Restrictions on eligibility were similar to the first act although this program had a considerably smaller appropriation.

The differences between the two programs were resolved in Miller v. Ayres, 191 S.E.2d 261 (1972). In this case the Comptroller and Attorney General of Virginia presented briefs to the Supreme Court of Virginia. The critical issue of these loan acts was which article of the Virginia Constitution should they be evaluated against. If the

aid was a loan, Section 11 should be utilized. If the aid was found to be a grant, the programs had to be tested against Section 10 which did not permit aid to go to students at sectarian institutions. The court concluded that the acts authorized conditional grants or gifts and did not fall under the concept of a loan in Article VIII, Section 11. The court ruled that the Acts violated Article VIII, Section 10 which prohibits grants to students attending sectarian institutions. The ruling did not find any conflict between the First Amendment of the U.S. Constitution and the two acts.

In 1973, the General Assembly revised the two versions of the tuition loan programs. In attempting to correct the deficiencies noted by the Supreme Court of Virginia, the legislature revised the means of repaying the loan. The funds could be repayed in one of the following manners:

1. Residence in Virginia and employment by the Commonwealth or a subdivision for a year.
2. Residence in Virginia and employment by certain kinds of charitable organizations for a year.
3. Residence in Virginia and employment within the state for a year and a half.
4. Residence in Virginia for a period of two years.
5. Service on active duty anywhere as a member of the armed forces of the U.S. for one year.

The new legislation was reviewed by the Supreme Court of Virginia with the Controller bringing suit against the Attorney General once again. The critical issue centered around the repayment issue. Did the legislature sufficiently change the methods of repayment so that the

funds the students receive could be defined as a loan and not a grant. If defined as a loan, Article VIII, Section 10 could be applied and the act be viewed as constitutionally permissible (McFarlane, 1973).

Once again, the Supreme Court of Virginia ruled that the Tuition Assistance Loan Program was in violation of Article VIII, Section 11. The court noted that a loan could be repayed in a manner other than monetary reimbursement but concluded that these loans had circumvented the intent of Article 11:

> We hold, therefore, that in order for financial aid to be valid as a loan under Section 11 of Article VIII, it must be repayable either in money or by public service to the Commonwealth. Four of the five alternative methods of repayment set for in the present legislation . . . fail to meet this test. Mere residence in the state, either by itself or couple with employment by the nonpublic employers permitted by the legislation or active duty in the armed services of the United States, and not acts substantially following the example of public service to the Commonwealth contemplated by Section 11 of Article VIII. (198 S.E.2d 634, 639 (1973))

The court also reviewed the legality of the act in terms of the First Amendment. In light of Tilton v. Richardson and Hunt v. McNair, the court did not find any constitutional violation. The decision noted the secular atmosphere of the colleges as opposed to primary and secondary secular education and concluded that Virginia's church-related colleges were no more secular than those in Tilton v. Richardson or Hunt v. McNair. As in the earlier decision, the Constitution of Virginia provided the stumbling block (Blanton, 1975).

In 1975, the General Assembly of Virginia attempted, for a third time, to pass a tuition aid program. This plan, known as the College Scholarship Assistance Act, is a program of grants and loans to certain

students attending public and specific private colleges in Virginia. The State Council of Higher Education was authorized to develop a program of financial aid to undergraduate students who attend "accredited, degree-granting public institution of higher learning in Virginia and . . . accredited, degree-granting, private, nonprofit, institution of higher education in Virginia excepting those institutions whose primary purpose is to provide religious training or theological eduation" (Virginia Code, 1975, 23-38.46). All grants and loans are to be based on student's financial need as established by the State Council of Higher Education and are to be awarded on a yearly basis with no grant or loan to exceed $1,000 for each academic year. The means of repayment are the same as those in the 1973 act and the aid could be applied to tuition, room and board.

The General Assembly claimed that the program is constitutional since the aid is in the form of conditional grants to students in nonsectarian private institutions. In relation to students in public institutions, the aid is constitutional without restriction. In this manner, the legislature has overcome the restrictions of Section 11 and allowed Section 10 to be applied to the aid to private, nonsectarian colleges. The broadening of the program to include students attending both public and private, nonsectarian institutions enables this program to remain legally acceptable. This program does not directly discuss the question of whether the funds given to the students are loans or grants but this issue has not found its way into the legal system (Virginia Code, 1975).

Washington

In Weiss v. O'Brien, 509 P.2d 973 (1973), the College Tuition Supplement Program of the State of Washington was declared to violate both the Washington and United States Constitutions. Any student who was taking twelve credits at an independent or private institution of higher learning within Washington which was accredited by tne Northwest Association of Secondary and Higher Education Schools was eligible for a grant of up to $100. The legislative intent of this law was "to recognize the contributions made to the educational levels of this state by the independent and private institutions of higher education and to acknowledge that the general education programs are in the public interest" (509 P.2d 973, 987 (1973)). Each school was to receive a single warrant from the State of Washington for those designated as eligible. Prior to the decision, the program had been in operation for one fiscal year in which 8,514 students were declared eligible and $1,145,455 was forwarded to the colleges.

In relation to Washington Constitution Article 9 which forbids aid to schools which are not free from sectarian control and influence, the Court reviewed the structure and operation of the ten institutions that had received aid during fiscal year 1971-72. The purposes, manner of governance, method of choice of faculty, makeup of the student bodies and degree of academic freedom of these schools was analyzed. The court stated:

> In summary, varying degrees of religious orientation characterize each of the institutions before us. None exhibits all of the possible constitutionally fatal criteria, but none is free of all prohibited

> elements. Constitution Article 9, Section 4 does not provide that a minimal amount of sectarian control or influence is permissible. We cannot say that any of these schools is completely free from such influences. (509 P.2d 973, 978 (1973))

The decision concluded that this act violated the Washington Constitution since the institutions receiving public funds were not totally free from sectarian control. The court feared that there would be a continuing financial dependency by the recipient institutions that could result in intrinsic political entanglement. The Tuition Supplement Program was ruled in violation of the First Amendment since the result of the transfer of public funds to non-public colleges would have the primary effect of advancing religion.

Wisconsin

In State ex rel. Warren v. Nusbaum, 198 N.W.2d 650 (1972), Chapter 44, Laws of 1971 was challenged as enacting unconstitutional aid. This act directed the state "to contract with a private nonprofit higher educational institution of this state for the provision of dental education services, paying $3,500 annually for each resident of Wisconsin enrolled as a full-time undergraduate student in dentistry" (198 N.W.2d 650, 652 (1972)). The statute had decreed that the aid was in the public interest and welfare of the State of Wisconsin. The aim of the aid was to insure the continued existence of the University of Marquette School of Dentistry which had a deficit of $62,611 in

1969-70. On December 23rd, 1971, Marquette University and the State of Wisconsin Higher Education Aids Board signed a contract. In exchange for the continuation of the dental program, the state agreed to pay $3500 for each state resident enrolled in the program. After the Secretary of the Wisconsin Department refused to release the funds, both parties requested that the statute be reviewed in court.

The Supreme Court of Wisconsin felt that four legal questions had to be resolved: Does the act reflect a secular legislative purpose: Is the primary effect of the act to advance religion? Does the administration of the Act foster an excessive entanglement with religion? Does the implementation of the act inhibit the free exercise of religion? The court noted the need for a valid legislative purpose by stating: "Not only is the legislative statement of intent to be given great weight, but the very nature of dental education reassures as to the completely secular nature of the teaching of dentistry" (198 N.W.2d 650, 654 (1972)). In regard to the possibility of the primary effect being one of advancing religion, the court noted what the act would have to adhere to. The state funds had to be to only the dental school of the university. The program also had to have the primary effect of not inhibiting the free choice of religion. There could be no state control over "the university's operation: except that of maintaining and operating the dental school . . . Since the contract can be upheld as valid only if it confined to the purely secular arm of dental school operation, the contract and controls must be limited to the same circumscribed area" (198 N.W.2d 650, 656 (1972)).

The question of entanglement was defined as excessive surveillance of the government to insure that religion is not intertwined with the purpose served by the state aid. If the aiding of dental education had the funds limited to secular purposes, the program could create a situation where the need for excessive governmental surveillance would be minimal. The educational situtation where no religious courses were required of the student body for graduation or entry into the college of dentistry would minimize the need for governmental entanglement.

The decision also discussed possible invalidity in relation to Article 1, Section 18 of the Wisconsin Constitution. Although similar to the Federal Constitution's Establishment Clause, the State Statute included the following clause: "Nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries" (198 N.W.2d 650, 659 (1972)). The Court concluded that this clause was not so restrictive so as to disqualify a properly drawn program.

The Wisconsin Supreme Court found Chapter 44 of the Laws of 1971 to be in violation of a number of the criteria that had been established. The statute violated the Establishment Clause by permitting funds to be used for operating costs and not being limited specifically to dental education. The act violated the free exercise clause by requiring hiring and management policies which were not limited to the dental school. There was a possibility of excessive entanglement since the ncessary nonreligious instruction clause for admission and graduation was omitted. The act was also in conflict with the Wisconsin Constitution since payment was not restricted to only dental school functions. The court stated:

> We conclude, as very nearly we begin by analogizing the undertaking here to the voyage of an ocean vessel. The ship was headed for a proper distination but it ran into a couple of reefs on its way into the harbor entrance. More carefully charted, the trip can be made, but it is for the legislature, not the courts, to determine whether it is to be made. (198 N.W.2d 650, 661 (1972))

In summary, the Court outlined how the act would have to be written to meet the restrictions of the United States and Wisconsin Constitutions. In terms of this aid, the Court concluded that the program did not meet the necessary restraints. If the decision had been rendered after further broadening of permissible aid, this program might have been acceptable.

Conclusion

In conclusion, a potential tuition grant program must overcome two basic hurdles. First, the plan must be compatible with the First Amendment of the U.S. Constitution or its tenets made applicable to state action through the Fourteenth Amendment. Second, programs must comply with restrictions elaborated in state constitutions. Of the programs reviewed, Alabama, Alaska, Nebraska, New York, South Carolina, Virginia, Washington and Wisconsin were declared unconstitutional due to conflicts with state constitutions. The conflicts in New York, South Carolina and Virginia were overcome through later legislation or constitutional amendment. In the states of Alabama, Nebraska, Tennessee,

Wisconsin, and Washington, potential programs were found incompatible with the First Amendment of the U.S. Constitution due to excessive entanglement in terms of the Establishment Clause.

A number of programs were declared illegal prior to the broadening of permissible aid in the Roemer v. Board of Public Works of Maryland decision. The State Supreme Court rulings might have been affirmative if decided after the 1976 landmark case. A program that might have been allowed is the College Tuition Supplement Program of Washington. Tennessee's program was at first ruled unconstitutional but a second, post Roemer v. Board of Public Works of Maryland, plan was acceptable.

Programs that have survived the legal tests operate with similar guidelines. In almost all programs, whether legally valid or declared unconstitutional, there is a clause prohibiting the use of funds for divinity or theological study. All of the programs require state residency for a student to be eligible and that the college or university be accredited by a regional accrediting agency. Several of the states require that the institution register as non-profit. A majority of the states has evaluated the potential colleges to determine if they are excessively sectarian. Most of the states have restricted the use of the funds to secular purposes although there are examples of operating programs that do not have this restriction. Some programs contain clauses that disallow aid to institutions that allow racial or religious discrimination.

Although the particulars may vary from state to state, over half the state legislatures have attempted to establish tuition aid programs for students attending private institutions of higher learning. A variety

of legal obstacles have thwarted some of these programs. Some of the legal conflicts have lessened with the decision in Roemer v. Board of Public Works of Maryland. While the legal obstacles have subsided, the financial constriction of state higher education funding probably has thwarted the growth of tuition aid programs for private colleges and their student population.

CHAPTER FOUR
STATE AID TO PRIVATE COLLEGES AND UNIVERSITIES

Introduction

State governments have aided private colleges and universities through a variety of programs. Some states have chosen to supply grants to residents who attend in-state private colleges. Other governmental bodies have chosen to aid directly the institutions being attended. A number of state facilities authorities have guaranteed bonds for construction at these colleges. Many of the programs have similarities in restrictions and guidelines. These programs are reviewed in this chapter.

The types of grant and aid programs for students attending either public or private institutions are noted. The level of aid often creates another type of subsidy for the private college.

Alabama

The Alabama Student Grant Program was created by Act 90 during the 1978 legislative session. This act designated the Alabama Commission on Higher Education as administrator of the program and "was established to provide direct grants to bonafide residents of Alabama for undergraduate

attendance at certain independent, nonprofit Alabama postsecondary educational institutions" (Alabama, 1981, p. 3). Eligibility for the program is defined by the following criteria: graduation from a secondary school, classification as an undergraduate student, identification as an Alabama resident as defined in the Act, citizenship in the United States and classification as a full or part-time student who is making satisfactory academic progress at an approved institution. Students cannot be enrolled in courses leading to degrees in theology or religion.

Eligible colleges are defined as independent, non-profit, post-secondary institutions located within the State. These colleges have to be accredited by the Southern Association of Colleges and Schools, have primarily non-sectarian curriculum and degree programs, have secular educational functions which are separated from religious activities, not discriminate in admission on religious or denominational basis and not receive a direct appropriation from the State of Alabama. Eleven institutions were approved by the Alabama Commission on Higher Education in 1978. During the 1978-79 fiscal year, 6,247 students attending sixteen approved institutions received $2,688,000, in grant payments with the maximum award being $550. During the next fiscal year, 6,768 students attending twelve institutions received $2,960,000. The maximum grant for this year was $564. During the 1980-81 fiscal year, the maximum award was reduced to $504 with 7,271 students receiving $2,677,000. The number of recipients ranged from 262 at Miles College to 1,547 at Samford University.

In order to be eligible for a maximum award, a student had to be enrolled on a full time basis for the entire academic year. The awards are issued on a pro-rated basis with the payments being made on a semester or quarter basis.

Students attending private colleges within the State of Alabama also are eligible to receive aid through the Alabama Student Assistance Program, a State/Federal cooperative aid program authorized by Title I of the 1965 Higher Education Act. This program is restricted to those with financial need and was first initiated in 1975. This student population also could receive funds through the Alabama Guaranteed Student Loan Program which was initiated in 1980 to provide in-state residents with financial assistance to attend accredited institutions within Alabama (Alabama, 1982). In summary, Alabama has recently developed a program that assists students to attend private colleges. The program has limitations similar to a number of older programs and has not been declared unconstitutional in the one court test.

Georgia

In 1971, the General Assembly of Georgia enacted the Private College Tuition Equalization Grant. The program was gradually funded to reach a level of $600 per academic year in 1975-76 and $675 in 1982-83 fiscal year. Both graduate and undergraduate students are eligible

as long as they are not enrolled in courses leading to degrees in theology, divinity or religious education or attend institutions whose instruction is primarily sectarian. The program is administered by the Georgia Student Finance Authority (Howard, 1976). In order for a student to be eligible, he or she must be enrolled in an accredited, non-profit, post secondary school within Georgia, be a twelve month legal resident of the State, be a U.S. citizen and be enrolled as a full-time student each semester.

Starting in 1974, the State of Georgia has developed a number of grant and loan programs that private colleges' student bodies are eligible for. Besides the federal grants that the State participates in, these students can receive funds from the State Direct Student Loan Program, Georgia Guaranteed Student Loan Program and the Student Incentive Grant (Georgia, 1982). In summary, Georgia has a long standing program that has withstood the scrutiny of the Attorney General's office. The Private College Tuition Equalization Program is a plan that has been copied in a number of states in the late 1970's.

Illinois

In 1971, Illinois' Legislature enacted the Financial Assistance Act for non-public institutions of higher learning. Students attending private colleges would be eligible to receive $100 per year in their first two undergraduate years and $200 per year for the later two years. The funds are administered by the State Board of Higher Education and cannot be

used in programs that emphasize sectarian instruction. In order to receive these funds, each student must be a state resident and must attend an institution where the governing board is independent and does not discriminate against the race, creed or color of the student body, faculty or staff. As of 1975, the funding had reached $6,000,000 per year with a legislative subcommittee attempting to increase the annual award. Private colleges have received aid directly through the Educational Facilities Authority that was established in 1969. The authority can issue bonds to help develop non-secular buildings. The bonds are paid off from the rent of the facilities that were built.

The State has a comprehensive program of scholarships, grants and guaranteed loans for in-state students attending private colleges. The awards are based on need and exam grades. The funds can be used for tuition and fees with the maximum award being $1,350 in 1974-75 (Howard, 1976). As of 1982, the maximum of the Monetary Award Program was raised to $1,950. Under the Illinois Guaranteed Loan Program, in-state students can borrow funds at 9% while, under the Parent Loans to Undergraduate Students, funds can be borrowed at a 14% interest rate (Illinois, 1982). In summary, the State of Illinois has developed a tuition supplement plan but, at present, the funding has not resulted in substantial aid to the participating students.

Iowa

The Legislature of Iowa has developed an aid program for students attending in-state private institutions of higher education. The Iowa Tuition Grant Program issues aid to needy students at in-state private colleges and universities. The aim of the program "is to equalize the tuition burden on students at private colleges with that on students in the state-supported system, thereby encouraging enrollment in the private sector and minimizing the need for the expansion of the state-supported institutions" (Howard, 1976, p. 299). The maximum grant is $1,000 but the amount cannot exceed the difference between the tuition fee at a private college versus that of a state university. The funds are forwarded directly to the school and credited to the student's account. In 1974-75 fiscal year, 6,500 students received an average of $900. In 1975-76, the funding was increased from $6,000,000 to $9,000,000. By 1981-82, the average award had reached $1700.

Students attending private colleges are able to receive assistance through the Iowa Scholarship Program. As of 1976, the maximum award was $610 with the amount received being based on ability and need. Students can receive guaranteed loans through the Iowa Higher Education commission. This commission is allowed to establish a student reserve loan fund but cannot involve the credit of the State. In summary, the Iowa Tuition Grant Program was initiated in 1975 and has not undergone scrutiny by the court system. The relative newness of the program is the probable cause for the lack of legal discussion.

Kansas

In 1972, the Kansas General Assembly passed a Tuition Grants Program. This plan is for state resident students who attend accredited in-state colleges and universities. Grants are awarded on a need basis with a limit of $1,000 per year or the students tuition and fees if the amount is less. The program was funded for $2,500,000 in 1975 and $2,900,000 in 1976.

Students attending private institutions can receive in-state scholarships of up to $500. The participants must attend in-state colleges and the awards are based on the individual's ability and financial need. In 1963, the State had made students at private institutions eligible for this grant as long as the college maintained a policy of non-biased, open enrollment. As of 1975, the Kansas Board of Regents was authorized to administer a student loan program that includes State allocated funds. In summary, Kansas' Tuition Grants Program became one of the pivotal programs due to the decision in Americans United for Separation of Church and State v. Bubb. The Federal District Court decision and the lack of review on the Supreme Court level helped expand and define what is permissible aid to private institutions of higher learning (Howard, 1976).

Kentucky

In 1976, the Kentucky General Assembly developed the Kentucky Tuition Grant Program. Colleges with solely sectarian programs are excluded as are in-state students enrolled in programs leading to degrees in theology, divinity or religious education. The colleges must be regionally accredited and the maximum amount awarded per student cannot exceed 50% of the average state appropriation per full-time equivalent enrolled in all the State's public institutions of higher education. In 1977-78, twenty-one colleges were eligible. Two thousand two hundred students received $1,146,000 with the average award being $518 per participant. The State appropriation for the Tuition Grant Program has been increased to $1,900,000 for fiscal year 1978-79.

Private colleges' student population can receive loans through the Kentucky Higher Education Loan Corporation. The program was enacted in 1966 with students enrolled in theology, divinity or religious education degree programs excluded from receiving aid. As of 1978-79, the State allocation for this program was $11,000,000 (Kentucky, 1978). In summary, Kentucky has a recently developed Tuition Grant Program that is well funded and has not been challenged in the State's judicial system.

Louisiana

In the mid 1970's, the General Assembly of Louisiana passed a series of aid programs that affected aid to students attending all types of higher education. These new programs were passed in anticipation of relaxed restrictions in a new State Constitution. The Constitutional Convention and Louisiana Supreme Court agreed that the State's regulations should parallel the broadened interpretation as defined in the recent federal level decisions. In 1975, House Bill #1313 authorized direct payments to eight private colleges, seven of which are church affiliated. Grants are restricted to 15% of each student's total educational and general expenditures with the payment being unrestricted and based on the number of state residents attending the college.

During the previous year, the Legislature had enacted a Higher Education Scholarship Program for state residents. As of July 1, 1975, direct grants to students attending public or private colleges were authorized. These grants are limited to $400 of the tuition and fees and are paid directly to the college. Students majoring in religious studies or theology are ineligible for the aid.

Louisiana is another state where the timing of the enactment of programs aiding private institutions affected the type of program. Since the aid to private colleges was enacted, Louisiana had developed a program that directly aids church affiliated institutions in a non-restricted manner (Howard, 1976).

Maine

In March, 1972, the Maine legislature enacted a Tuition Equalization Fund for state residents entering in-state private colleges and universities. Grants are for full-time undergraduates and are based upon need. Each institution bills the State for the students and applies the funds to the specific account. The colleges are audited by the State to verify proper receipt of the funds. As of 1976, an individual grant could not exceed $900 per academic year. During the 1974-75 fiscal year, the average grant was $720. As of 1975-76, $432,000 was allocated for the program.

Private college students are eligible for loans as of 1968. Due to an amendment to Article VIII of the State Constitution in the previous year, bonds "to secure funds for loans to Maine students attending institutions of higher education" (Howard, 1976, p. 379), could be issued. A 1968 law established that not more than $4,000,000 could be in the loan program for Maine students enrolled in higher education.

Maine's Tuition Equalization Fund is a long standing program that has not come under the scrutiny of the court system. The program was enacted after changes in the State's Constitution. The compliance with this document has allowed the plan to remain entact.

Maryland

As of 1971, the Legislature of Maryland had passed a program for the aid to private colleges and universities. Known as the Aid to Independent Institutions Program, this act appropriated $200 for each two-year graduate and $500 for every four-year graduate. In 1974, the program was amended to provide a formula in which 15% of the average expenditure per student at state colleges was multiplied by the number of full-time students enrolled at each institution (Olliver, 1975). By 1980, the level of funding had been raised to 20% of the state per student support. Funds for the program amounted to $6,200,000 in 1979, $7,700,000 in 1980 and $9,100,000 in 1981 with $10,297,844 estimated for fiscal year 1982. The average state aid to independent colleges was $442 in 1981 and $489 for the next fiscal year. This program is coordinated by the State Board for Higher Education.

Students attending private institutions are eligible for assistance through a number of state aid programs. Besides the array of federal grants and loan programs, Maryland's students can apply for the General State Scholarship and Guaranteed Student Loan Program. The awards from the former are prorated per General Assembly district on the basis of the Scholastic Aptitude Test and demonstrated financial needs. The scholarship ranges from $200 to $1500 with the money applicable to any education related expense. The Maryland Higher Education Loan corporation finances student loans which are guaranteed by the State. Undergraduate students can borrow up to $3,000 per academic year while graduate students are able to obtain $5,000 per year (Maryland, 1981).

The Aid to Independent Institutions Program resulted in the landmark case of Roemer v. Board of Public Works which was decided by the U.S. Supreme Court in 1976. As previously discussed, this case broadened the type of permissible aid and the circumstances of how the aid could be administered to private colleges and universities. The Supreme Court allowed the State of Maryland to aid directly the participating colleges and universities. The funds could be used for any sectarian purpose.

Michigan

Michigan's Legislature has developed a number of aid programs for private colleges and universities. The State directly pays a specified sum to a number of dental and law schools for each state resident to earn a degree. Private colleges are eligible for tax exempt bonds to build facilities under the 1969 Higher Education Facilities Authority. This authority was given the power to lend money to private institutions for the acquisition of educational facilities or the issuing of tax exempt bonds. In 1973, the power of the authority was expanded to be able to lend funds to refund outstanding obligations from the acquisition of buildings. These facilities cannot be used for sectarian purposes.

In 1974, the Legislature extended to nonpublic colleges direct payment for Michigan residents earning associate degrees ($200) and

bachelor's and master's degrees ($400). Payment could not be received for theology or divinity degrees. The payment could not exceed 15% of a college's educational and general expenditures (Howard, 1976). Previously to 1970, the State initiated a Tuition Grant Program for private college students who demonstrated financial need. These grants could not exceed the total amount of tuition and fees and students receiving other scholarships were ineligible.

Despite a decade of inconsistent funding during the 1970's, the State of Michigan developed a Tuition Differential Grant Program during fiscal year 1978-79. During the first year, 14,000 private college students received $4,200,000 from the State. As of 1980-81, the Tuition Differential Grant Program reached 36,000 students who received $9,000,000. Due to limited funds, the amount of each award was reduced from the previous year. Full time students received $320 which was down from $500 while part-time students received $160 vs. $250 for the previous year. Under Act Number 105 of the Public Acts of 1978, the Higher Education Assistance Authority was authorized to make payments to a full-time or part-time resident student enrolled in a private non-profit school located within the State. To be eligible, a private college or university has to be approved by the State Board of Education, incorporated under Act 327 of the Public Acts of 1931 and have an instructional program not comprised solely of sectarian instruction or religious worship. A student is eligible for a grant by meeting the following criteria: enrolled full-time or part-time at an eligible institution, not be enrolled in a program leading to a divinity degree, be a resident in the state for the

previous twelve months and be making satisfactory academic progress toward a degree. The amount each student could be granted would not exceed $600 or the level of tuition and fees for a full academic year.

Students attending private colleges also are eligible for a number of state aid programs. Since 1961, Michigan had maintained a Guaranteed Loan Program. For 1981, the program totaled 131,000 loans for $279,000,000. In 1975, the State created the Michigan Higher Education Student Loan Authority. This authority guranteed loans that were not accepted by private banks. The Direct Loan Program totaled 33,000 loans for $62,500,000 in 1981. Students are able to receive grants and scholarships under the Michigan Competitive Scholarship Program, Differential Grant Program, Legislative Merit Award Program and the Michigan Tuition Grant Program. These programs totaled $40,000,000 in 1980-81 (Michigan, 1981). In summary, Michigan has developed a tuition aid program that is similar to a number of previously developed programs since the funds go directly to the students.

Minnesota

The Legislature of Minnesota developed a tuition aid program in the 1970's. The Private College Contract Program was initiated in 1971 with the passage of a law which authorized the payment of $396 a year per four year or graduate student and $317 a year per two year student to the eligible colleges. This program was further amended in 1975. Eligible institutions are defined as private colleges and

universities of higher education located in Minnesota that operate on a non-profit basis and grant associate or higher degrees. The institutions must be fully accredited by the North Central Association of Secondary Schools and Colleges or is determined by the Minnesota Higher Education Coordinating Commission as maintaining equivalent standards to accredited programs. Colleges that prepare individuals for religious vocations, have instruction for the promotion of religion or maintain affiliation with a particular religious organization are disqualified from receiving aid.

In order for an eligible institution to receive funds, students must be defined as Minnesota residents and be enrolled in non-religious programs on a full-time basis. The executive director of the Higher Education Coordinating Commission has been given the responsibility for the administration of the program including method of payment (Olliver, 1975). The contract program provided for payment of $150 per bachelor's degree and $140 per associate degree for full time non grant-in-aid students and $500 and $400 respectively for grant-in-aid recipients (Howard, 1976).

For fiscal year 1980, four two-year colleges and nineteen four year institutions received aid. Included among these are art, law, and chiropractic colleges. The Private College Contract Program payments to eligible institutions totaled $4,629,886 (Minnesota Statutes, 1975).

Private colleges also receive funds through programs that aid all colleges within the state. The State of Minnesota has authorized the State Higher Education Facilities Authority to "construct, remodel,

repair, maintain, manage, operate and lease a lessor or lessee facilities for the benefit of private post high school education institutions and to designate any eligible institution as its agent in carrying out these activities" (Howard, 1976, p. 472). As a result, private colleges have received funds for projects which are financed from revenue bonds issued by the State Higher Education Facilities Authority. As of 1967, students attending private institutions are eligible to receive loans from the Higher Education Coordinating Commission. In the same year, this commission was impowered to issue tuition grants to needy students who met a specific academic standard. In 1971, a needs alone tuition grants program was initiated. The maximum award from both programs was established at $1,100 (Howard, 1976). Since 1973, the State has funded a work-study program in which state money can amount to eighty percent of the wages. In summary, Minnesota has directly aided private colleges with grants per student attending since 1971. Although revised several times, the program has not been legally challenged.

Missouri

In 1975, the Legislature of Missouri established the Student Grant Program which aids needy in-state residents who attend approved colleges. In order to be eligible, students must be enrolled as full-time students at approved colleges, demonstrate financial need, be U.S. citizens and twelve month residents of Missouri, have applied for federal assistance

programs and not be majoring in theology or divinity (Missouri, 1981b). In 1975, eligible students could receive up to $900 per year although the amount of the award is limited to half the amount of the tuition of the institution being attended. During the 1974-75 fiscal year, $3,780,000 was allocated to 10,000 students. The average grant was $378 in that year (Howard, 1976). As of 1981, the maximum award had been raised to $1500 per year.

Students attending private colleges are eligible for a number of Missouri state aid programs. As of 1981, in-state students could receive funds through the Missouri Guaranteed Student Loan Program. Dependent undergraduates can receive $2500 per year, independent undergraduates have a maximum of $3000 and graduate or professional students can borrow up to $5000 per year. The present rate of interest is 9%. Under the Parent Loan Program, parents can borrow up to $3000 per year at 9% interest (Missouri, 1981a). In summary, Missouri has developed a solid Student Grant Program. This plan was established recently and with the proper guidelines to have avoided legal scrutiny.

New Jersey

The New Jersey Legislature enacted a tuition program in 1978. This plan, known as the Independent College and University Assistance Act is restricted to independent institutions incorporated and located within the state that are non-profit and degree granting. These institutions must be accredited by the Middle States Association of

Colleges and Schools. Any institution involved primarily in the training of ministers, priests or rabbis is disqualified from receiving funding.

For eligible schools, the Board of Education of New Jersey is authorized to pay an amount based on the number of full-time New Jersey resident undergraduates enrolled the preceding academic year. The amount of funding is calculated at 25% of the level of direct per student support for the State college sector. The funds are distributed in the following manner: 10% divided equally among eligible institutions, 35% divided on the basis of financial need of the students and 55% based on the number of New Jersey full-time equivalent students enrolled during the previous year. The funds could be used for any purposes "except sectarian instruction, the construction or maintenance of sectarian facilities or for any other sectarian purpose" (New Jersey, 1978, p. 3). A separate ledger of accounts is required to demonstrate how eligible students are derived and how the funds are spent. These accounts are audited annually by the State Board of Education.

Since 1966, private colleges have been receiving assistance through the New Jersey Education Facilities Authority. Through a series of court decisions, this program and its aid to private colleges has been declared constitutional. Students attending public or private in-state institutions are eligible for the Tuition Aid Grants, a needs based program, and Garden State Scholarships, an achievement based program. The former program ranges from $100 to $400 while the later varies from $200 to $500. If financial need can be shown, the maximum

on the second program is $1900. In terms of loan programs, the State has a Guaranteed Student Loan Program and a Parent Loan Program. The annual maximum with both programs is $3,000 with the interest rate being 9% in 1980 (New Jersey, 1981).

In summary, New Jersey has one of the newest private college aid programs. This program has a complicated formula but the end result is that the private colleges within the State are aided directly. The program has not been challenged in the courts.

New York

As previously discussed, the New York Legislature enacted Section 6401 of the Education Law or Bundy Act in 1969. This act provided for the unrestricted aid to private, eligible institutions. Colleges under the control of religious denominations or engaged in the teaching of a denominational doctrine were declared ineligible. This definition resulted in three decisions in the Appellate Court of New York. In the initial year, the awards per student were $400 for each bachelor's and master's degree and $2,400 for each doctoral degree.

In 1973, a private two-year colleges became eligible to receive $300 for each associate degree completed. Through a series of increases, eligible private receive $450 per associate degree, $1200 per bachelor's degree, $900 per master's degree and $4,500 per doctoral degree. At the close of the first academic year, fifty seven colleges and universities received $25,500,000. By fiscal year 1978-79, ninety institutions had

been declared eligible and received $66,100,000. As of 1979, there were one hundred and nineteen potentially eligible institutions in the State of New York. Ninety were receiving aid, eighteen had never applied, nine were determined ineligible and had remained so and two were seeking eligibility. Throughout the program, the use of the funds have remained unrestricted although each institution is required to submit an annual report on the use of the funds (New York, 1979).

Private colleges have received funds through the Dormitory Authority Act of 1944. Upon being amended, this act made health organizations and private colleges as well as public colleges eligible for projects. As of the 1974-75 fiscal year, nine projects with a total value of $110,800,000 had been completed at eight colleges (Howard, 1976).

For students attending either private or public colleges, New York State has an extensive array of grant and award programs. Most of these programs were consolidated or developed in the 1974 New York Education Law. Overall, these programs totaled $305,000,000 in 1981-82. In 1974, the Regents College Scholarships, established in 1913, and the 1963 Scholar Incentive Award were restructured into the Tuition Assistance Program. The Regents Scholarship was limited to $250 per year with the Tuition Assistance Program having a need-based maximum of up to $1500 for tuition payment. By 1981, the maximum award had been raised to $2,200 per year with a minimum of $250. On the graduate level, awards up to $600 were granted. The funding for 1981-82 was $285,800,000 for 360,000 students. The State's Guaranteed Student Loan Program began in 1958. Through a variety of different State loan programs, 413,000 students receive $875,600,000 in 1980-81.

In this year, students could borrow up to $3,000 per year at nine percent interest (New York, 1982).

Since New York State's program of direct aid to private college was initiated after the addition of the Blaine Amendment to the State Constitution, the validity of Section 6401 of the Education Act has not been legally challenged. Questions of eligibility have involved the State's courts. Overall, the amount of funding in this program is limited compared what an individual student can receive from the State's Higher Education Services Corporation.

North Carolina

A 1970 amendment to Article V, Section 2 of the State Constitution enabled the North Carolina General Assembly to develop a program that aided students attending private colleges. As of 1971, the State could contract with private organizations for public purposes. The General Assembly authorized the Board of Governors of the University of North Carolina to aid undergraduates attending accredited private colleges and universities within the State. Each participant is to receive a fixed amount for each in-state student enrolled and is required to distribute the funds to the eligible student. Those attending seminaries, bible colleges and other similar religious institutions are excluded. For the 1975-77 biennium, $18,000,000 was authorized by the Legislature.

In 1975, the State Educational Assistance Authority was authorized to grant $200 to full-time, in-state residents attending accredited

colleges. Students enrolled in religious education studies cannot participate in the program.

Through the State Educational Assistance Authority, undergraduate students at approved institutions are able to receive guaranteed loans. The program is limited to $50,000,000 in outstanding loans. As of 1975-76, $4,200,000 was allocated for loans (Howard, 1976). In summary, the State of North Carolina was able to enact a tuition aid program only after the State Constitution was amended.

North Dakota

In 1978, North Dakota's Legislature established the Tuition Assistance Grant Program to aid students attending accredited colleges within the State. Eligible schools were defined as those accredited by the North Central Association of Colleges and Secondary Schools or the Accredited Association of Bible Colleges. To be eligible, students had to demonstrate financial need and be a full or half time student who is making satisfactory progress toward a degree. The maximum award is based on the amount of financial need, the difference between the private institution's tuition and the highest state college's tuition or $1500. The program is directed by the State Board of Higher Education (North Dakota, 1981).

Students from North Dakota are eligible for aid under the Guaranteed Loan Program. This program also is administered by the State Board of

Higher Education. In conclusion, this state recently initiated a Tuition Assistance Program. In contrast to its southern neighbor, the financial award is considerable higher. There have been no court challenges to this program.

Oregon

As previously mentioned, the Legislature of Oregon had attempted to enact a Tuition Equalization Program in 1969. When the Attorney General ruled that this program was illegal, the program was revised in 1971 under Oregon Statute number 352.720 for the Purchase of Educational Services from Independent Colleges. Institutions are reimbursed for work completed by in-state undergraduates in non-sectarian courses. Initially, the Legislature provided $250 per student to eligible institutions for each resident student enrolled for fiscal year 1970-71. By fiscal year 1979-80, the amount had risen to $535 per full-time equivalent. Seventeen schools received $2,558,023 during that year. A majority of the colleges were sectarian although those receiving aid included the Museum Art School.

Private and public institutions of higher learning are eligible for credit to construct facilities. Article XI-F(1) of the 1950 Oregon Constitution empowered the State to grant bonds that would:

> provide funds with which to redeem and refund outstanding revenue bonds issued to finance the cost of building and other projects for higher education, and to construct, improve, repair, equip and furnish

> buildings and other structures for such purpose and to purchase or improve sites therefor. (Howard, 1976, p. 718)

Funds could be released only for buildings that would be self-liquidating and self-supporting from revenues, grants or fees. A 1964 amendment granted aid to community colleges and the control of the program is the responsibility of the State Board of Higher Education.

Students attending public or private colleges are eligible for assistance through a variety of state based scholarship and loan programs. The State Scholarship Commission administers need-based and academic grants. As of 1977, the maximum need grant was $1500 per year. A Higher Education Student Loan Fund regulates the disbursement of funds from a number of federal loan programs. The State Scholarship Commission can loan state residents up to $1,000 per year for undergraduate studies and up to $1,500 per year for graduate studies. In summary, the State of Oregon has aided students attending both private and public colleges. Since the original revision of the Tuition Equalization Program, the direct funding of private colleges has not been challenged in the court system.

Pennsylvania

As of 1974, the Legislature of Pennsylvania enacted a somewhat limited Institutional Assistance Grants Act. This program granted no more than $400 per student enrolled to eligible institutions who have enrolled

Pennsylvania scholarship students. The funds can be expended on educational costs other than those defined as sectarian or denominational. Institutions who discriminate against any applicant for admission are ineligible. Annual audits are made by the State of Pennsylvania. For fiscal year 1975-76, $12,000,000 was appropriated to the Pennsylvania Higher Education Assistance Agency for the program (Pennsylvania, 1974). As of 1967, private colleges could receive bonds for construction projects through the Higher Education Facilities Authority. Non-profit institutions that are accredited by the State Board of Education are eligible for funds. Buildings could serve any purpose except for sectarian education or religious worship (Howard, 1976).

Individual students attending private or public colleges are eligible for assistance through a number of programs. Students can receive up to $1500 per year at approved in-state institutions. This award is limited to 80% of the total of tuition and fees. State residents attending approved out of state colleges can receive up to $600 per academic year. In-state residents are eligible for loans through the State Guaranteed Student Loan Program. Full time undergraduates can receive up to $2500 per year with the maximum for graduate students being $5,000 per year. As of January 1, 1981, the interest rate was established at 9%. A supplementary loan program, known as PLUS, allows students or their parents to borrow up to $3,000 per year (Pennsylvania, 1981). In summary, Pennsylvania has a long standing program that directly aids private colleges for attendance of a limited number of in-state residents. The program has not been challenged in the judicial system.

South Carolina

After the decision in Hartness v. Patterson struck down the original tuition support program, the Legislature of South Carolina enacted a second program. As previously mentioned, individual students could receive up to $1,500 under the second tuition grant program. The average per student appropriation for fiscal year 1972-73 was $1,235. Funding for the program has increased from $5,000 in 1970-71 to $4,000,000 in 1973-74 and $11,000,000 for fiscal year 1980-81. The maximum allocation has increased to $2,000 per year with the minimum grant being $100. When originally enacted, fifteen schools were declared eligible but, by 1981, all nineteen of the participants from the first program had been declared eligible. The funds go directly to the students. In order to be eligible, a student has to be a resident of South Carolina for a year, demonstrate academic merit and financial need and be enrolled as a full-time student in an in-state independent college or university and not be enrolled in a degree in theology, divinity or religious education (South Carolina, 1981). Through the Educational Facilities Authority, private colleges have been able to receive low cost bonds to construct facilities. The establishment of this program resulted in the decision of Hunt v. McNair, one of the landmark decisions previously mentioned.

As of 1976, students attending private colleges could receive funds through the State Education Assistance Act. This act established the State Educational Assistance Authority to coordinate loans to needy students. As of 1978, $15,000,000 was made available to students attending in-state public and private colleges. In summary, direct

aid to private colleges was initially in conflict with the State of South Carolina's Constitution. After a constitutional revision and a legal clarification, the program was able to survive and expand.

South Dakota

In 1978, the Legislature of South Dakota established the Tuition Equalization Grants program. This plan provides for up to $250 to needy students attending a North Central Association of Colleges and Secondary Schools accredited private college within the State. In order to be eligible for the funds, students must be South Dakota residents, enrolled as full-time undergraduates, not be enrolled in a theology or religious education program and not receive an athletic scholarship or Student Incentive Grant from the State. The program is administered by the Secretary of the Department of Education and Cultural Affairs. The financial aid office of each eligible school forwards the individual applications to the Department of Education. The award is based on the need of each student although the maximum award is limited (South Dakota, 1982).

Students attending in-state institutions can also receive funds of up to $2,000 per year through the South Dakota Student Incentive Grant Program. This program which was established in 1974 utilizes a variety of federal sources for funding. The grant is limited to the total of tuition and fees. In summary, South Dakota has a limited

Tuition Equalization Grants Program that was initiated at a late date and has not been challenged in the court system.

Texas

As of 1971, the Texas Legislature enacted the Tuition Equalization Grants Program. Originally, each in-state resident attending an eligible college could receive awards up to $600. This program was scrutinized by the Attorney General's office in a series of previously discussed opinions. The overall program was not struck down but the scope was restricted. A 1973 opinion resulted in the revision of the act. The use of funds for the benefit of any sectarian program or seminary was prohibited as was the aiding of students in religious degree programs. The colleges are required to prohibit racial or religious discrimination in relation to the program (Howard, 1976). By fiscal year 1979-80, $12,890 had been allocated for the program with the ceiling for each individual being $1,136 per academic year. The average grant this year was $687. In 1980-81, $13,070,000 was allocated for the program with the maximum award being $1,328. To be eligible for a grant, a student has to pay more than Texas resident tuition rates, be enrolled at least half-time in an approved institution, demonstrate financial need, not be the recipient of an athletic scholarship and not be enrolled in a religious degree program (Texas, 1979).

Private institutions were further aided by the Higher Education Authority Act of 1969 which "assisted non-profit, accredited, degree

granting colleges and universities in the construction of educational and housing facilities" (Howard, 1976, p. 860). Besides the usual array of federal aid programs, students attending private colleges in Texas are eligible for assistance through a number of state programs. As of 1965, students could borrow insured funds that are issued by the State as bonds. This program has been augmented by the 1979 creation of a public, non-profit corporation known as the Texas Guaranteed Student Loan Corporation. The establishment of this corporation increased the availability of funds for loans. In summary, the State of Texas has aided private college students directly through a revised program that has substantial funding.

Virginia

The General Assembly's attempts to aid private colleges and universities have resulted in a number of court cases and a series of revised programs. In 1975, this legislature passed a third attempt at a tuition aid program. As previously mentioned, this program was known as the College Scholarship Assistance Act. Grants were based on student's financial need, were awarded by the State Council of Higher Education and had a maximum award of $1,000 per year. Accredited institutions had to be accredited and non-profit and not primarily involved in religious training (Olliver, 1975).

As of 1980, the name of the plan had been changed to the Virginia Tuition Assistance Grant Program. Funds were allocated for each student to receive $625 in 1980-81 and $700 in 1981-82 (Virginia, 1982).

Through the Virginia College Building Authority, in-state private colleges are eligible to receive aid for the acquisition, construction and financing of facilities. Initiated in 1973, the authority can float bonds that are backed by the credit or mortgage of the institution receiving funds. The bonds are repayable out of the revenues of the authority or institution (Howard, 1976).

Students attending private in-state colleges are eligible for federal grant and loan programs, the Virginia College Scholarship Assistance Program, and the Commonwealth Incentive Grant Program. In the first state plan, any student with sufficient need can receive up to $600 in 1982-83. In the second state program, students attending colleges of the predominantly opposite race can receive a one time $1,000 grant. Students also can receive up to $2500 per year through the Guaranteed Student Loan Program. In summary, Virginia's General Assembly needed a number of attempts to pass an acceptable tuition assistance program. The program is relatively modest with the annual award amounting to $700.

Wisconsin

In 1965, the Legislature of Wisconsin established the Tuition Grant Program which "provides need-based grants to Wisconsin resident undergraduates enrolled in private, nonprofit colleges, universities, vocational/technical schools, and nursing schools in Wisconsin that charge fees/tuition in excess of the instructional fees assess resident undergraduate students at the UW-Madison" (Wisconsin, 1981, p. AIII-1). This program aided 6001 students with expenditures of $2,340,000 in 1971. In 1979-80, 8780 students received $10,460,000 with the average grant being $1290. For 1980-81 and 1981-82, $10,310,000 and $10,780,000 respectively have been budgeted. The grants are based on need but the suggested differential between private colleges' tuition and that of UW-Madison's tuition has not been reached. In 1980-81, this differential was $2,500 with the maximum tuition grant award being $1,800 in 1979-81 and $2,000 in 1981-83. In 1979-80, 61% of the in-state students attending participating colleges received funds from the Tuition Grant Program.

Besides receiving funds through the major federal grant programs, students attending private colleges in this state can receive funding from a vareity of state sources. Grants can be received through the Wisconsin Higher Education Grant Program. For fiscal year 1979-80 and 1980-81, 22,400 and 18,780 students respectively received $10,000,000 and $5,800,000. In terms of loans, students can borrow up to $2,500 per academic year through the Wisconsin State Loans Program. Needy students from poverty areas can receive up to $1,800 per year through the Talent Incentive Grants (Wisconsin, 1981).

In summary, Wisconsin has a long standing Tuition Grant Program that has grown in funding since 1971. Recent economic conditions within the State have resulted in a leveling off of this program and a decline in funding of their student aid programs. The Tuition Grant Program has never been challenged in the State's court system with the only related case involving aid to a private dental college (State ex rel. Warran v. Nusbaum).

Conclusion

Two types of basic programs from state governments have been developed. First, a number of states directly aid students who attend in-state, private colleges. Examples of states that have developed this type of program are: Alabama, Georgia, Illinois, Iowa, Maine, Maryland and Pennsylvania. The amounts of the grant vary from $100 in Illinois to $1500 in North Dakota and $2000 in South Carolina and Wisconsin. Almost all of the grants are restricted to being applied against tuition and fees. The amount of the award is often based on need with religious studies being excluded from eligibility. The level of a number of these programs is a percentage of the private colleges' tuition or a ratio between the private colleges' and state institutions' tuitions. Other states have chosen to aid directly the private institution of higher education being attended. Maryland, Michigan, Minnesota, New York and New Jersey are some of the states

that have chosen this route. The highest amount paid directly is in New York State where participating colleges receive $1200 per B.A., $900 per M.A. and $4500 per Ph.D.

Both types of programs appear to have similar restrictions. Awards are for state residents at in-state institutions. Participating colleges must be approved either by a state board or accrediting agency. Most programs have secular use restrictions. A number of the programs have anti-discrimination clauses that must be adhered to by approved institutions.

Private colleges and universities receive aid in a number of states through bonds guaranteed by state facilities authorities. Similarly to the programs listed above, the facilities are restricted to secular purposes. The types of facilities vary from dormitories to student unions and instructional buildings. Some of the states with facilities authorities are: Maryland, Minnesota, New York, Oregon, Pennsylvania, South Carolina, Texas and Virginia.

The level of aid that private college students receive relates to the types of programs that both public and private institutions' student bodies are eligible for. If the level of state aid through grant and loan programs is high, a specific student may choose to attend a more expensive private institution. This could occur in New York State. Besides directly aiding private institutions, New York has developed a generous Tuition Assistance Program. Under this plan, students attending private colleges can receive up to $2200 per year for tuition and fees. Since this amount is more than what is charged at public state universities, the State is directly aiding the student population

that attends private institutions. The level of state generated grant and loan funds must be examined to evaluate what level each state assists private colleges and universities.

CHAPTER FIVE
GUIDELINES FOR STATE AID TO PRIVATE COLLEGES

Introduction

The guidelines that are to be developed for valid governmental aid to private institutions of higher learning come from a variety of sources. Several of the guidelines are derived from federal constitutional law. Through a series of Supreme Court decisions, a body of law governing the First Amendment and the Establishment Clause has been developed. These decisions are directed at governmental aid for private, religious affiliated institutions. Private colleges not affiliated with religious organizations would be little concerned with the first three guidelines but should comply with the other guidelines that are listed in this chapter. The other guidelines have been derived from regulations on the state constitutional level or statutory law from state legislatures. Examples for these guidelines are derived from state constitutions or the statutes and programs themselves.

Through the Supreme Court's decisions, the three-tiered or three part test has been developed. This test has been summarized in Lemon v. Kurtzman:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236,

> 243; finally, the statute must not foster an excessive governmental entanglement with religion. (403 U.S. 612, 612-13 (1971))

The concepts summarized in this case will serve as the basis for the first three guidelines suggested herein.

Neutrality Toward Religion

The program or statute must have a primary effect of neither advancing nor inhibiting religion. The college or university involved cannot be so pervasively sectarian as to inhibit the separation of secular and sectarian functions. The aid must be directed to secular instruction.

The concept of neutrality toward religion as applied to governmental aid to private educational institutions was first enunciated in Everson v. Board of Education. In comparing bus fee reimbursement to police or fire protection, the majority decision stated that the state had neither advanced nor inhibited religion and had remained neutral toward the Establishment Clause of the First Amendment. The Supreme Court attempted to define the scope of both the federal and state government's aid toward private sectarian educational institutions by stating:

> Neither can pass laws which aid one religion, aid all religions or prefer one religion over another . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. (330 U.S. 1, 15-16 (1947))

In Abington School District v. Schempp, this concept and that of a secular legislative purpose are combined to form a "primary purpose test." In a case involving a Pennsylvania statute that authorized selected bible readings and a Baltimore School Commissioner's regulation allowing the reciting of the Lord's prayer or reading from the bible, the Supreme Court found both requirements in conflict with the necessary constitutional neutrality of the Establishment Clause. The court concluded:

> The test may be stated as follows: What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. (374 U.S. 203, 222-23 (1963))

In this case, the Supreme Court began to develop what became known as the three-tiered test.

In Board of Education v. Allen, the Supreme Court again used the fledgling "primary purpose test" in ruling on an Establishment Clause challenge against a New York State book loan law. In reaffirming the earlier decisions, the Court concluded that this type of aid neither advanced nor inhibited religion and had a secular legislative purpose. The decision stated:

> The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools and the financial benefits is to parents and children, not schools. (392 U.S. 236, 243-44 (1968))

In Lemon v. Kurtzman, the neutrality of religion was combined with the secular legislative purpose and excessive governmental entanglement clauses to form the three-tiered test. This case involved a Rhode Island act that decreed a salary supplement to non-public school teachers and a Pennsylvania law which allowed the State to purchase educational services from non-public schools. The majority decision of Chief Justice Berger outlined the cumulative criteria of the newly developed three-tiered test. This is quoted in the introduction section of this chapter. A discussion of whether the legislation had a primary effect of advancing or inhibiting religion was not included in the decision since the acts were found to have excessive governmental entanglement.

On the same day as the decision in Lemon v. Kurtzman, the Supreme Court announced the decision in Tilton v. Richardson. This case discussed the application of the 1963 Higher Education Facilities Act to private colleges in the State of Connecticut. Similar to the previous case, the Supreme Court did not find any conflict with the secular purpose of this governmental action. The decision noted the critical distinction between the educational experience on the primary and secondary level and on the post-secondary level. According to the Court, "the critical point is not whether some benefit accrues to a religious institution as a consequence of the legislative program but whether its principal or primary effect advances religion" (403 U.S. 672, 679 (1971)).

The distinction of the levels of education in analyzing whether the primary effect advances religion was the critical issue in the cases of Committee for Public Education v. Nyquist, Sloan v. Lemon and Levitt v.

Committee for Public Education. All three of these governmental aid to primary and secondary school programs were disqualified for giving direct and immediate aid tc institutions that were defined as being sectarian. In these decisions, the Supreme Court reinforced the critical distinction between lower and higher education in analyzing whether a statute has the primary effect of advancing religion.

In Hunt v. McNair, South Carolina's Education Facilities Act was scrutinized by the recently formulated three-tiered test of Lemon v. Kurtzman. In this case, the Supreme Court concluded that the issue of revenue bonds for the building of facilities of Baptist College passed the three-tiered test. In terms of a secular legislative purpose, the decision referred back to Tilton v. Richardson by evaluating whether Baptist College was pervasively sectarian. Once the Court ruled that the college was sufficiently secular, the majority concluded that there was no primary effect of either advancing or prohibiting religion. In order to be defined as having a neutral primary effect, the Court noted that the institution had to not be so sectarian so that its secular function could not be isolated and the aid could not fund a sectarian activity at an otherwise secular setting.

In a final case, Roemer v. Board of Public Works of the State of Maryland, the Supreme Court utilized and further refined the three-tiered test. The statute in this case provided governmental aid of unspecified purpose to eligible private colleges. The question of the primary effect being that of aiding religion was analyzed in a fashion similar to that of Hunt v. McNair. The institutions were analyzed to note if the colleges were so pervasively sectarian that the secular

and sectarian activities could not be separated and whether the aid could be applied to only secular activities. The Supreme Court concluded that the involved institutions were not so pervasively sectarian as to conflict with the statute's prohibition of sectarian use of the funds. This decision reiterated the two clauses needed for aid to have a neutral primary effect.

The decision in Roemer v. Board of Public Works of the State of Maryland weighed the burden of proof on the primary effect concept. Since the finding of secular legislative purpose is routine and this decision ruled on excessive entanglement through a discussion of pervasive sectarianism, the primary effect analysis is the critical part of the three-tiered test. If there is no legal conflict with this segment of the test, the statute being examined will most probably be ruled constitutional.

The concept of neutrality toward religion may have been expanded in Americans United for Separation of Church and State v. Bubb. This case involved a Kansas statute which provided tuition grants to college students within the State. The awards were forwarded directly to the colleges with no restriction for non-secular use. In contrast to Roemer v. Board of Public Works where the broad based aid was limited to secular activities, this decision noted that a portion of the funds may be used inadvertantly for religious activities. The Court noted:

> There is no way we can be sure that the students will not take part in religious activities. We do not believe, however, that the tuition grant program is unconstitutional because some recipients become involved in religious activities. . . . The opportunity is there for religious participation but the degree of

> involvement depends totally upon the student. Religious participation is voluntary and is thus distinct from the education received at these church schools. (379 F. Supp. 892, 893 (1974))

Since the Supreme Court has not reviewed this case, the semantically broadened aid is presently legal.

In conclusion, each statute or program must be neutral toward religion which means that the legislation can neither advance nor inhibit religion. Through a series of Supreme Court decisions, this concept has evolved into two ideas, that the college or university participating in the program cannot be so pervasively sectarian as to inhibit the separation of secular and sectarian functions and that the aid cannot be isolated to sectarian activities. In the last decision on the Supreme Court level, the need for a primary effect of neither advancing nor inhibiting religion was given precedence over the other two parts of the three-tiered test.

Secular Legislative Purpose

The program or statute must have a secular legislative purpose. The program should enhance the quality of secular education for the state's residents.

The concept was first noted in Abington School District v. Schempp. As previously noted, the need for a secular legislative purpose was mentioned in conjunction with the need for the legislation to neither advance nor inhibit religion. This combination was known as the "primary purpose test."

In Board of Education v. Allen, the Supreme Court noted that New York State's loan of books to sectarian schools did have a secular legislative purpose. Since the textbooks were provided for secular courses only, there was no conflict with the First Amendment and the Establishment Clause. This concept again was coupled with that of neutrality toward religion to form a primary purpose test.

As previously discussed, the secular legislative concept was combined in Lemon v. Kurtzman to form the three-tiered test. In this case, the statutes which aided non-public primary and secondary schools were viewed as having secular legislative purposes since the acts intended to enhance the quality of secular education in Rhode Island and Pennsylvania. The two states exhibited concern in the area of education on the primary and secondary level.

In the companion case of Tilton v. Richardson, the Supreme Court dismissed any conflict with the Connecticut's Higher Education Facilities Act and the test of secular purpose. The decision stated that the aiding of higher education's expansion within the state was a valid secular objective appropriate for governmental action.

The decision in Hunt v. McNair utilized the complete three-tiered test developed in Lemon v. Kurtzman. As in a number of previous cases the Court had no difficulty in finding the purpose of the act to be secular. Ninety-five percent of the students attending Baptist College were legal residents of South Carolina and the function of the statute was to provide facilities at institutions of higher education.

In Roemer v. Board of Public Works of the State of Maryland, any conflict with a secular legislative purpose quickly was dismissed. The

decision declared that the direct aid to private, in-state colleges was of secular legislative purpose and concluded that this program was a financially acceptable alternative to a completely public system.

In conclusion, for a statute to have a secular legislative purpose, the potential funds must enhance the secular education for a portion of the state population. On the higher education level, the Supreme Court has not found the programs reviewed as lacking secular legislative purposes.

Excessive Governmental Entanglement

The program or statute must not foster excessive governmental entanglement with religion. The level of the institution participating in the program is instrumental in determining the possible entanglement.

This concept was first discussed in Walz v. Tax Commissioner, a case not directly involving education in sectarian institutions. In a case involving tax exemptions for places of religious worship, the Supreme Court upheld the universal exemption from state taxation of property used exclusively for religious, educational or charitable purposes. Although acknowledging that the tax exemption constituted a type of governmental aid, the Supreme Court was more fearful of excessive governmental entanglement with religious organizations. Even if a statute did not have the effect of advancing religion or had a secular legislative effect, the act could be declared unconstitutional if excessive governmental entanglement with religion could be shown. The

Court noted: "The general principle to be derived from the First Amendment and all that has been said by the Court is thus; that we will not tolerate either governmentally established religion or government interference with religion" (397 U.S. 669, 674 (1970)). At this point, the excessive entanglement concept was not combined with the other two parts of the three-tiered test.

The concept of excessive governmental entanglement was combined with the other sections of the three-tiered test in Lemon v. Kurtzman. The Supreme Court found that both statutes in this case fostered an impermissible degree of governmental entanglement with religion since there was a high degree of interaction between the respective states and parochial schools which involved considerable religious activity and purpose. The Court further objected to the States' requirements for auditing of sectarian schools' financial records. The decision stated:

> The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the relgiion clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family and the institutions of private choice, and that while some involvement and entanglement is inevitable, lines must be drawn. (403 U.S. 612, 625 (1971))

In the companion case of Tilton v. Richardson, the critical legal issue was again that of excessive entanglement. The Court had to decide if the differences between higher education and primary and secondary education were sufficient to limit excessive governmental entanglement. Since the colleges were defined as being primarily

concerned with secular education, were not an integral part of a religious mission and the student bodies were less impressionable, the Supreme Court concluded that there was a sufficiently lessened degree of governmental entanglement. The Court further noted that this aid was one time, directed to the construction of religiously neutral facilities and did not involve annual audits. In adopting the use of the higher education versus lower education distinction, the Court avoided declaring whether an institution was secular or not. The critical point is if the college's educational program is primarily involved in secular education. The Court concluded:

> In light, inter alia, of the skepticism of college students, the nature of college and post-graduate courses, the high degree of academic freedom characterizing many church-related colleges, unlocal constituency, and the lack of continuing financial relationship, one-time construction grants to colleges and universities, as opposed to continuing subsidization of teachers in primary and secondary schools, do not foster excessive government entanglement of religion in violation of the First Amendment. (403 U.S. 672, 686 (1971))

In Hunt v. McNair, the question of excessive entanglement was analyzed in terms of the educational level as in the previous case. The Supreme Court found that the educational experience at Baptist College was sufficiently secular and concluded that "there is no evidence to demonstrate that the college is any more an instrument of religious indoctrination than were the colleges and universities involved in Tilton" (413 U.S. 734, 746 (1973)).

In Roemer v. Board of Public Works of the State of Maryland, the question of what constitutes excessive entanglement was analyzed in a different legal manner. In analyzing the potential of excessive

entanglement, the majority opinion of Justice Blackmun referred back to the conclusions reached in the primary effect section. The Court concluded that there would be no excessive entanglement if the involved institutions were not pervasively sectarian. Despite the establishment of a continuing financial relationship, annual audits and state analysis of institutional expenditures, the Supreme Court ruled that there was not excessive entanglement. A concurring opinion by Justices White and Rehnquist summed up the expansion of the types of permissible aid:

> As long as there is secular legislative purpose and as long as the primary effect of the legislation is neither to advance nor inhibit religion, I see no reason . . . to take the constitutional inquiry further. (426 U.S. 736, 768 (1976))

In conclusion, excessive entanglement can be defined as extraordinary involvement of a governmental body with a sectarian institution. According to a number of the highest court's decisions, the possibility of excessive entanglement is lessened when the governmental agencies are interacting with higher education institutions. The type of aid, whether on-going or one time, contributes to the potential of excessive governmental entanglement.

Compliance with State Constitutional Regulations

The program or statute must comply with state constitutional regulations. In several states, the constitutional constraints are more restrictive than those on the federal level.

The statutes must comply with these regulations to be legally valid. In some states, the constitutions were amended to legalize state aid to private colleges. Examples of these state level restrictions are below.

In Opinion of the Justices, the Alabama Supreme Court ruled as unconstitutional House Bill #247 which was to provide tuition grants for state residents attending private colleges. The Court found conflict with Article 14, Section 263 of the Alabama Constitution which states:

> No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational schools. (280 So. 2d 547, 552 (1973))

In rejecting the legality of the act, the State Supreme Court noted excessive entanglement between the State and religion.

In Sheldon Jackson College v. State of Alaska, the Alaska Supreme Court ruled on the constitutionality of a tuition grant program for state residents attending private colleges. The Court found this program in violation of Article VII, Section 1 of the Constitution of Alaska. This Article states: "No money shall be paid from public funds for the direct benefit of any religious or other private educational institution" (599 P.2d 127, 128 (1979)).

In Rogers v. Swanson, the Supreme Court of Nebraska ruled on the validity of Legislative Act #117 of 1974 which provided tuition aid to in-state students attending private colleges. The Supreme Court of Nebraska found conflict with both Article III, Section 18 and Article VII, Section 11 of the State Constitution. The first article "prohibits the granting to any corporation, association or individual any special or exclusive privileges, community or franchises whatever" (219 N.W.2d 726, 733 (1974)), while the second article prohibits direct appropriations to private colleges. The Court ruled that the potential program accorded special privileges and directly aided private institutions.

In Weiss v. O'Brien, the College Tuition Supplement Program of the State of Washington was evaluated in terms of Article 9 of the state constitution which forbids aid to schools that are not free from sectarian control and influence. After analyzing ten institutions that had received aid during fiscal year 1971-72, the State Supreme Court found that none of the schools were free of sectarian influence. Consequently, the College Tuition Supplement Program was declared in violation of Washington's Constitution.

In three states, South Carolina, Texas and Virginia, constitutional conflicts to tuition aid programs were overcome through amendments to the constitutions or changes in the potential statutes. In Hartness v. Paterson, an initial tuition grant program was declared in violation of Article XI, Section 9 of the State Constitution of South Carolina. The document stated that property or credit of the State of South Carolina shall not "be used . . . in the aid or maintenance of any college, school, hospital, orphan house or other institution . . . which

is wholly or in part under the direction of any religious or sectarian denomination" (179 S.E.2d 908 (1971)). A 1972 constitutional revision allowed such aid to be permissible and was upheld in Durham v. McLeod, a case involving the State's guaranteed loan program.

In the State of Texas, an opinion of the Attorney General resulted in the restructuring of the Tuition Equalization Grants Program. In 1972, the Attorney General's opinion noted that the State Constitution prohibited aiding of sectarian schools. As a result of this opinion, funds were prohibited from use in programs that benefit any sect or seminary, by any student enrolled in a theology or religious degree program or at any college that discriminated on a racial or religious basis. The program was then restructured in accordance with the guidelines outlined by the Attorney General. In 1974, the Attorney General's office did disqualify from participation in the program a college that required all faculty members to be of one faith.

In Virginia, the amendment of one article and the addition of another to the State's Constitution enabled the legislature to develop the Tuition Assistance Loan Program. Article VIII, Section 10 was amended to enable the Legislature to appropriate funds to in-state residents attending non-sectarian private colleges. The added Article VIII, Section 11 empowered the Legislature to develop a loan program for students attending private colleges in primarily sectarian programs. The General Assembly needed three attempts to enact a constitutionally valid program. In Miller v. Ayres, 1972 and 1973, the enacted program was held to be in violation of Article VII, Section 11 as an improper loan. In 1975, the College Scholarship Assistance Act was passed and found to not be in conflict with the amended and added articles of Virginia's Constitution.

In conclusion, any type of tuition aid program must adhere to the restraints placed on plans by the individual state's constitution. In several cases, the states' constitutions are more restrictive than the U.S. Constitution. A program can fall within the legal bounds of the three-tiered test for the Establishment Clause and be declared invalid on the state level.

Non-Discrimination Clause

The program or statute must include a non-discrimination clause by the institutions involved. Students attending these colleges cannot be discriminated against because of race, religion, or creed.

A number of states have added non-discrimination clauses for the institutions of higher education being attended by students receiving tuition grants. These restrictions upon eligibility are an outgrowth of the Civil Rights legislation of the 1960's and appear to be based on solid legal and moral grounds. Examples of states with non-discriminatory grounds are listed below.

The 1978 Alabama Student Grant Program contains a non-discrimination clause. Students receiving grants must attend colleges which, among other criteria, cannot discriminate in admission on religious or denominational basis.

In 1971, Illinois enacted the Financial Assistance Act for students attending private colleges. In order to receive funds, students have to

attend colleges that do not discriminate against the race, creed or color of the student body, faculty or staff.

The 1974 Pennsylvania Institutional Assistance Grants Act contains a similar non-discrimination clause. Four hundred dollars per Pennsylvania scholarship student is awarded to colleges which, among other criteria, do not discriminate against any applicant for admission.

The 1974 revised Tuition Equalization Grants Program of Texas contains a similar clause. Colleges where eligible students are enrolled are required to prohibit racial or religious discrimination in relation to the program.

In summary, a number of states have incorporated non-discriminatory clauses in their tuition aid programs. This type of clause bars racial and religious discrimination against students at participating institutions.

Accreditation

The program or statute must require that the participating institutions be accredited by regional accrediting or state agencies. Quality control is assured by membership in regional accrediting organization or by approval or an approriate state agency.

Many of the programs contain such a clause. By requiring institutions to be accredited, the states are guaranteeing a certain level of education in the participating secular instructional programs. The following states require certification by a regional accreditation

agency or state governmental body: Alabama, Arkansas, Kansas, Kentucky, Minnesota, Missouri, New Jersey, North Carolina, North Dakota, South Dakota, Tennessee and Virginia.

In conclusion, twelve of the states with tuition aid programs have required that participating colleges and universities be accredited institutions. The states are insuring a certain level of instruction in the secular instructional programs that will involve the governmental funds.

Conclusion

The six guidelines that a tuition grant program or statute must comply with are:

1. The program or statute must have a primary effect of neither advancing nor inhibiting religion. The college or university involved cannot be so pervasively sectarian as to inhibit the separation of secular and sectarian functions. The aid must be directed to secular instruction.
2. The program or statute must have a secular legislative purpose. The program should enhance the quality of secular education for the state's residents.
3. The program or statute must not foster excessive governmental entanglement with religion. The level

of the institution participating in the program is instrumental in determining the possible entanglement.

4. The program or statute must comply with state constitutional regulations. In several states, the constitutional constraints are more restrictive than those on the federal level.
5. The program or statute must include a non-discrimination clause by the institutions involved. Students attending these colleges cannot be discriminated against because of race, religion or creed.
6. The program or statute must require that the participating institutions be accredited by regional accrediting or state agencies. Quality control is assured by membership in regional accrediting organization or by approval by appropriate state agencies.

All six of these guidelines must be applied to programs involving private, religious affiliated colleges. The last three guidelines must be met by programs that restrict state aid to private, secular institutions of higher education.

CHAPTER SIX
FLORIDA'S TUITION VOUCHER FUND

Background

In two sections of the 1968 Constitution of Florida, the type of permissible aid to private institutions is limited. A restriction against state revenue being directed toward sectarian institutions is noted in Article I, Section 3:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

The use of state school funds is restricted in Article IX, Section 6:

> The income derived from the state school fund shall, and the principal of the fund may, be appropriated but only to the support and maintenance of free public schools.

The decisions in Nohrr v. Brevard County Education Facilities Authority and Overman v. State Board of Control discuss the question of state aid to institutions of higher learning.

Nohrr v. Brevard County Education Facilities Authority

In Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 301 (1971), the use of revenue bonds authorized through the Higher Education Facilities Authorities Law of 1969 was scrutinized. Under the provisions of the law, the Board of County Commissioners of Brevard County "found that a public need existed in the county and that the public interest would be served if a County Educational Facilities Authority was created" (247 So.2d 301, 303 (1971)). Florida Institute of Technology, a private college within the county, applied for assistance in construcing a dormitory-cafeteria. The rents and other revenues generated were pledged as security for the revenue bonds.

The State of Florida attempted to thwart the efforts of the authority and was sued. The defendants claimed that the issuing of the bonds illegally involved the public's taxing or credit and these funds were not being used for a public purpose. The State of Florida claimed that the Educational Facilities Law violated the First and Fourteenth Amendments of the U.S. Constitution and Article I, Section 3 of the State Constitution "since the issuing of bonds could aid sectarian institutions and conflict with the proper separation of church and state" (247 So.2d 301, 305 (1971)).

The Supreme Court of Florida concluded that the statute had been properly and legally adopted. The credit or taxing power of the State or any subdivision had not been pledged as payment of the principal or interest of the revenue bonds. "The purchasers of the revenue bonds may not look to any legal or moral obligation on the part of the State, county or authority to pay any portion of the bonds" (247 So.2d

301, 309 (1971)). In regard to the public purpose argument, the Court concluded that the education of the youth of the state was within the confines of this concept. Compared with the South Carolina program later approved by the Supreme Court in Hunt v. McNair, this statute is broader. There is no restriction on the use of funds for the construction of sectarian buildings (Howard, 1976). Since this provision was not argued in the case, the Supreme Court of Florida did not rule on the lack of such a restriction.

Overman v. State Board of Control

In an earlier case, the Florida Supreme Court ruled on a direct subsidy to a private, in-state college. The case, Overman v. State Board of Control, 62 So.2d 696 (1952), involved the constitutionality of a direct subsidy to the University of Miami College of Medicine. The State Board of Control initiated the suit in regard to the need for an interpretation of Chapter 267.63 of the Acts of 1971. This bill authorized the payment of $3,000 per year for each state resident enrolled in the first approved and accredited college of medicine within the State. Payment would be made for students who had been state residents for seven years. The issue brought to the Court was when does the $3,000 appropriation begin. Would the fund be available immediately or in four years when the University of Miami College of Medicine would become accredited? In order to work toward accreditation, the college had to gather sufficient funds to equip a program and hire

a faculty, make an agreement with Jackson Hospital to be able to appoint medical staff and insure hospital standards and be assured of the $3,000 per in-state student subsidy.

The Supreme Court of Florida concluded that the University of Miami had met every criterion except for being in existence for four years. The Court stated:

> The Legislature intended the appropriation to be available on receipt of student enrollment as provided in section three, provided the first medical school has met all requirements of the act and the American Medical Association to that date. This seems to be the reasonable interpretation and it certainly affects the legislative purpose. Read in sum we think the act refutes any other purpose. (62 So.2d 696, 702 (1952))

The Court reviewed a second issue of whether the Act violated Article IX, Section 7 and 10 of the State Constitution. Section 7 prohibited the levying of a tax for a chartered company while Section 10 disallowed the pledging or loaning of the State's credit to any individual company, corporation or association. The Court did not consider a non-profit educational institution a chartered company and concluded:

> It is common knowledge that the legislature has for years been considering ways and means to better provide [sic] for medical education in the state . . . It is a legislative prerogative and the law, constitutional and statutory that imposes the duty of providing ample educational facilities for the people of the state on the legislature. We find nothing in Sections 7 and 10, Article IX or any other provision of the Constitution that forbids. (62 So.2d 701-02 (1952))

Independent Colleges and Universities of Florida

The effort to develop a tuition voucher program within the State of Florida was initiated and spearheaded by the Independent Colleges and Universities of Florida (ICUF). This organization consists of the State's seventeen private colleges and universities, a number of which are affiliated with a religious organization. These institutions of higher learning are: Barry College, Bethune-Cookman College, Biscayne College, Eckerd College, Embry-Riddle Aeronautical University, Flagler College, Florida Institute of Technology, Florida Memorial College, Florida Southern College, Jacksonville University, Nova University, Palm Beach Atlantic College, Rollins College, Saint Leo College, Stetson University, University of Miami and University of Tampa. The Presidents' Council of ICUF launched a statewide campaign to convince the Legislature to aid directly private colleges and assist in the survival of both the public and private systems within Florida. In 1978, the Council claimed that the present State system of higher education was

> virtually no different from other governmental bureaucracies in the degree to which they foster unnecessary expansion and exercise centralization . . . Along with the certainty of continuing inflation, it is reasonable to predict that a monolithic public system will soon place intolerable demands on the State's tax structure. (ICUF Newsletter, p. 1)

The Council of Presidents claimed that the economic impact could be evaluated in terms of students served, people employed and savings to the taxpayers. In order to encourage the State Legislature, the Presidents' Council proposed that the General Assembly:

1. Formulate a State policy with respect to higher education which, while acknowledging the role of the public sector, would assure the preservation of the dual system of public-independent higher education in Florida.

2. Establish an impartial, non-administrative commission on higher education which would include in its membership representatives from all units of higher education in the State, both independent and public, as well as lay representation, which would:

   a. Make recommendations directly to the Legislature that would ensure the revitalization and preservation of the dual system of higher education in the State.

   b. Determine the financial and educational merits of a tuition equalization program based upon actual total costs of education as they are reflected in both the public and independent sectors of higher education in the State.

   c. Conduct a study of the optimal use of all higher education resources in the State prior to any further expansion of State supported higher education in terms of capital development, regional centers and branch campuses.

   d. Assure a reasonable balance between the public and independent sectors of Florida higher education through the delineation of specific goals and objectives for each in terms of programs, enrollments and long-range cost.

3. Act immediately to insure that the independent sector of Florida higher education as fully represented on all public educational committees and commissions and that such representation be appointed from nominations made by appropriate organizations of independent institutions, rather than State agencies.

4. Provide for the presentation of the views of representative of the independent sector of Florida higher education during the annual sessions of the Legislature and at all other appropriate public hearings.

5. Require the implementation of present legislation so that the legislative intent for the State to contract with independent institutions for educational services in the interest of quality and economy may be carried out.

6. Ensure that all State and federal funds for student aid and program support are equitably distributed between and among the several units in the public and independent sectors. (ICUF Newsletter, 1978, p. 6)

In 1978, the student population of the private sector served 57,000 students and employed a faculty of 2,400. In 1953, the ratio of public and private students attending post-secondary education was 50 to 50. In 1978, 85% of the student body attended public colleges while only 15% attended private institutions. In 1968, the differential in tuition was $1,275 while this gap had widened ten years later to be $2,890 (ICUF Newsletter, 1978, p. 6).

Post-Secondary Education Commission

During the years 1978 and 1979, the Post-Secondary Education Commission (PEC) evaluated the private institutions' plight with the aim being the development of a public policy toward this sector of higher education. This commission was established in 1973 with the function of advising the Commissioner of Education and State Board of Education on the concerns of higher education within the State. PEC gathered information on the current relationship of the State of Florida and private, in-state colleges, the resources of these

institutions and the relationship of other states and their private sectors.

In 1979, the Commission published a series of recommendations and goals to help foster a healthy private sector within higher education in the State of Florida. The recommendations are summarized as follows:

1. The existence of a functioning private sector is essential for the health of higher education within the State. This goal would provide students with options and would promote diversity within the higher education community. The State should promote high quality learning in both public and private in-state colleges.

2. Statewide planning for higher education should include participation by both the public and private sectors. This could eliminate unnecessary duplication of programs.

3. The State should encourage access to post-secondary education for Florida residents at both public and private institutions.

4. The State of Florida "should provide its residents a choice in their selection of post-secondary institutions. Equal opportunity demands that both access and choice are operative and the independent sector is an essential component in the statewide system that provides a full range of opportunities. The Commission recommends, therefore, the creation of a Florida Tuition Assistance Program (TAP), which would decrease the tuition gap thereby encouraging student freedom of choice in matching individual educational goals with the academic offerings of a diverse system of post-secondary education." (Florida, 1979, p. 7)

5. The State should recognize the excellent contribution of the private colleges and universities.

6. State programs that benefit private colleges should be closely monitored.

7. Study of the relationship of the private and public sector should continue.

Legal Memorandums

In March 1979, the Higher Education Committees of both the House and Senate began work on the Tuition Voucher Fund. The potential plan was known as Senate Bill 364 and House Bill 696. The report of the Post-secondary Education Commission was used as one of the rationales for the program. The Committees requested that the firm of Mahoney, Hadlow and Adams investigate the legal ramifications of such a plan.

The attorneys reviewed a program that was to authorize $1,000 per academic year to students attending specific, accredited private, in-state colleges and universities that are not primarily functioning to train students for the clergy or ministry. In order to qualify for the tuition voucher, an individual had to be a full-time undergraduate, be residing in the State two years preceding the award, be making satisfactory progress toward a degree and not be enrolled in a program leading to a degree in theology or divinity. In April, 1979, the legal firm responded with two memorandums of law.

The first issue reviewed was that of potential conflict with the First Amendment to the U.S. Constitution which states that "no laws respecting an establishment of religion, or prohibiting the free exercise thereof" can be promulgated. As previously discussed, the Establishment and Free Exercise Clauses in the First Amendment are applicable to the State through the Fourteenth Amendment. The attorneys noted that three major tenets have been developed by the Supreme Court: "Volunteerism of religious belief and conduct, government

neutrality toward religion and separation of Church and State" (Mahoney, Hadlow and Adams, 1979a, p. 2).

In a summary form, the memorandum reviewed the decisions in Cantwell v. Connecticut, Abington School District v. Schempp and Walz v. Tax Commission. The decisions in Tilton v. Richardson, Lemon v. Kurtzman, Hunt v. McNair and Roemer v. Board of Public Works were analyzed more thoroughly. All of the above cases are discussed at length in a previous chapter. In reviewing the potential Act against the three-tiered test that was developed in these decisions, the attorneys concluded that the legislation would fall within permissible guidelines. The memorandum concluded that the First and Fourteenth Amendments had not been violated since

> First, the primary purpose of the Act is a secular one to benefit the educational system of the state and not to favor any particular religious organization. Secondly, by excluding from the benefits of the bill, students enrolled in a program of study leading to a degree in theology or divinity and colleges and universities primarily operated to prepare students for a career in theology or divinity, the primary effect of the bill would be other than the advancement of religion. Thirdly, the aid scheme would not involve excessive entanglement by the state with religion, since the aided institutions are colleges and not elementary or secondary schools and a majority of the institutions aided have no religious affiliation and those institutions with religious affiliation will be substantially autonomous. In addition, although state supervision of the Fund will be necessary, it is unlikely that such supervision and other contacts between the state and the colleges will be more entangling than inspections and audits involved in the course of normal college accreditations. (Mahoney, Hadlow and Adams, 1979a, p. 6)

On the State level, the memorandum next reviewed the potential fund against Article I, Section 3 of the 1968 Constitution of Florida. This article states:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof . . . No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution. (Mahoney, Hadlow, and Adams, 1979a, p. 6)

In applying this prohibition, the Courts of Florida have relied on only one aspect of the three-tiered test. The critical issue has been that of secular legislative purpose in which the primary effect is that of neither advancing or inhibiting a specific religion.

In a series of decisions, the Supreme Court of Florida has held that an incidental benefit to a religious organization resulting from a valid use of public property did not violate Article I, Section 3. The Court concluded that the State and its political subdivisions could exercise reasonable discretion in the use of public land and facilities for religious purposes. In Southside Estates Baptist Church v. Board of Trustees, School District #1, 115 So.2d 697 (1959), Koerner v. Borck, 100 So.2d 398 (1958) and Fenske v. Coddington, 57 So.2d 452 (1952), the Supreme Court determined that no particular religion had been favored. Through the decisions, the Court allowed the use of public school facilities and state lands for religious meetings.

In Johnson v. Presbyterian Homes of the Synod of Florida, Inc., 239 So.2d 256 (1970), the plaintiff claimed that the assessment of property taxes on these homes for the aged was unconstitutional. In

relying on Walz v. Tax Commissioner, the Supreme Court found no violation with Article I, Section 3 by noting that there cannot be a rigid interpretation of the Establishment and Free Exercise Clauses of the First Amendment. The particular acts should be analyzed to their effect or promoting or conflicting with religious beliefs or practices. Florida's Supreme Court found the tax exemption as incidental to a general welfare purpose and stated that "any benefit received by religious denominations is merely incidental to the achievement of a public purpose" (239 So. 2d 261 (1970)).

The above mentioned decision developed guidelines for the decision in Nohrr v. Brevard County Educational Facilities Act. As previously discussed, the Florida Supreme Court found the purpose of the Act to promote general welfare of the State's citizens and not violate either the First Amendment or Florida's Article I, Section 3.

The memorandum of law reviewed one final case in the discussion of this constitutional issue. In Horne v. Hernando County, 297 So. 2d 606 (1974), the Second District Court of Appeals utilized the rationale of the two previous cases and upheld a county zoning ordinance which forbade the issuance of alcoholic beverages licenses to any new business within 1500 feet of a church. By noting that the primary purpose of the law was to promote the general welfare of the community and not to promote religion, the District Court of Appeals found no conflict with Article I, Section 3 of the State Constitution.

In analyzing the constraints of Article I, Section 3 upon the potential State Tuition Voucher Fund, the attorneys concluded:

> It is clear that the Fund which would be established by this legislation is not prohibited by Article I, Section 3 of the Florida Constitution. The primary purpose of the Fund is to increase the educational opportunities of citizens of the state and to lessen the financial burden of the public institutions of the state to educate citizens. Moreover, since the voucher is paid to the student rather than the college or university it is an individual rather than institutional aid. The fact that religiously affiliated institutions may indirectly benefit from aid given directly to citizens of the state who are students in such institutions, does not make such aid constitutionally impermissible. (Mahoney, Hadlow and Adams, 1979a, p. 10)

A Second memorandum of Law of April 30th, 1979, discussed another critical issue of state aid to private institutions of higher education. The issue was whether the absence of a direct prohibition of use of funds for sectarian purposes by the participating institution was in conflict with the Establishment Clause of the U.S. Constitution's First Amendment and/or Article I, Section 3 of Florida's Constitution. The memorandum reviewed similar cases that dealt with this issue in a discussion of the three-tiered test. In terms of the lack of a prohibition of use for secular purposes clause, the attorneys summarized the recent developments in Roemer v. Board of Public Works and Americans United for the Separation of Church and State v. Blanton. In the first case, the Supreme Court concluded that a "definition of sectarian purposes which excluded the teaching of religion or theology was sufficiently broad to withstand constitutional analysis under the primary effect test" (Mahoney, Hadlow and Adams, 1979a, p. 2). In a similar fashion, the later case satisfied the Establishment Clause Test without specifically using the phrase "sectarian purposes." The test can be satisfied by prohibiting the use of state funds for theology, divinity or religious study. The memorandum concluded:

> This legislation by excluding from the benefits of the bill students enrolled in a program of study leading to a degree in theology or divinity and colleges or universities primarily operated to prepare students for a career in theology or divinity, would prohibit the use of state funds for specifically religious activities and the primary effect of the legislation would be other than the advancement of a specific religion. Further, it is clear that regulations can be implemented under the specific exclusion in this legislation to define theology and divinity to assure that state funds are not used primarily for sectarian purposes. (Mahoney, Hadlow and Adams, 1979b, p. 3)

On the state level, the attorneys reviewed a number of lower level cases that discussed this issue. Cases mentioned included California Education Facilities Authority v. Priest, State ex rel. Warren v. Nusbaum, Johnson v. Presbyterian Homes of the Synod of Florida, Inc., Nohrr v. Brevard County Education Facilities Authority, Rogers v. Swanson, Opinion of the Justices, Weiss v. Bruno and Miller v. Ayres. In each case, the attorneys noted whether the program had sufficiently conformed with the specific constitutional restrictions of the respective state. The memorandum noted:

> Those cases which have struck down state aid programs on state constitutional grounds have relied either on a state constitutional provision specifically broader in its scope that Article I, Section 3 of the Florida Constitution or found that the challenged legislation provided direct financial assistance to a secular educational institution and not the students enrolled in the school, and there has the primary effect of directly aiding sectarian institutions. (Mahoney, Hadlow and Adams, 1979b, p. 5)

Since Article I, Section 3 does not contain directly restrictive clauses, the Attorneys concluded that the proposed legislation would not be in conflict with the State's Constitution.

Legislative Action

In the later part of April, 1979, the companion bills were introduced in the Florida House and Senate. At this point, a number of concepts were added to the original proposal. Students have to reside in Florida for two years to be eligible. A four year phase-in for the $1,000 annual award was added, beginning in July, 1979. The amount of the tuition voucher was to be reduced if this award plus other grants exceeds the total of tuition and fees. As of the fall of 1978, in-state residents attending private institutions totaled 13,739. The cost of the first year of the program was estimated at $3,780,000 with the four year total predicted to be $13,739,000. Subsequently, Senate Bill 364 and House Bill 696 became Florida Statute 240.401 known as State Tuition Vouchers.

According to the statute, tuition vouchers can be issued to undergraduates enrolled in an in-state, non-profit college or university which is chartered by the State and accredited by an agency that has membership in the Council on Post-secondary Accreditation. In order to be eligible, a student must be a graduate of a Florida high school; a resident of the State for two years; making satisfactory academic progress; a full-time student; and not be enrolled in a program leading to a theology or divinity degree (see Appendix I-III).

The program is administered through the Florida Student Financial Assistance Corporation. A recipient of the award is able to transfer from one eligible institution to another. The college being attended must submit a requisition for payment. Upon receipt of the request, a

state warrant is forwarded to be credited in the student's account. Full refunds to the State of Florida are necessary if the student is not a full time student or withdraws from school. For the 1979-80 academic year, $2,400,000 was allocated for the program with the per student award being $1,000. During this year, the number of awards ranged from eleven at Nova University to 343 at Bethune Cookman College and 745 at the University of Miami. As of 1980-81, the appropriation had risen to $4,100,000 for the fiscal year with the per student award being reduced to $750.

Grants and Scholarships

In terms of other aid available to students attending in-state private colleges, the State of Florida has developed several relevant programs. A Regents Scholarship program was inaugurated in fiscal year 1968-69 but was replaced by the Florida Student Assistance Grants in fiscal year 1972-73. From its inception to present, the grant can total up to $1200 per academic year and is renewable for the equivalent of 8 semesters or 12 quarters. Students must demonstrate need for tuition and be enrolled in an in-state, accredited college. Transfer from one institution to another is acceptable and the funds are channeled through the institution being attended (Florida, 1982).

The State has developed two student loan programs. The first became effective in 1967 when $500,000 was appropriated for a permanent trust fund. Students attending accredited institutions are eligible with

forty percent of the funds reserved for those attending private colleges. A second program was enacted after the adoption of Article VII, Section 15 of the revised, 1968 State Constitution was enacted. This section authorized the issuing of revenue bonds for student loans. $40,000,000 of bonds was authorized by the Legislature and supplemented by increased fees from state universities and community colleges. Students who are bona-fide state residents and attending in-state accredited institutions are eligible for loans (Howard, 1976).

Students attending in-state private colleges can receive funds from a number of lesser aid programs. These include Scholarships for Children of Deceased or Disabled Veterans, Confederate Memorial Scholarships, and the Seminole and Miccossuke Indian Scholarships (Florida, 1982).

As a means of illustrating the usefulness of the guidelines developed in the previous chapter, the Tuition Voucher Fund will be analyzed according to them. The six guidelines are to be applied to Florida's program. The State's methods of legal justification will be related to these guidelines.

Neutral Effect Upon Religion

In order for a program to be legally valid, the statute must neither advance nor inhibit religion. The participating college must be sufficiently secular as to allow the separation of secular and sectarian functions while the funds must be used for secular purposes.

This concept was first enunciated in Everson v. Board of Education. Through the decisions in Abington School District v. Schempp, Board of Education v. Allen and Lemon v. Kurtzman, the requirement for neutrality toward religion became part of the three-tiered test. In Roemer v. Board of Public Works of Maryland, the Supreme Court refined the three-tiered test. If the participating institutions are not so pervasively sectarian that the secular and sectarian functions cannot be separated and the funds are applied to only sectarian activities, the aid would be legal.

Two clauses of Florida's Tuition Voucher Fund's statute address the requirement for the program to neither advance nor inhibit religion. The second clause of the statute states:

> The department shall issue from the fund a tuition voucher to any full-time undergraduate student registered at a nonprofit college or university which . . . is not a state university or pervasively sectarian institution.

In the section on eligibility, the state notes that:

> A person is eligible to receive such tuition voucher if . . . He is not enrolled in a program leading to a degree in theology or divinity.

In the first clause, Florida's statute disqualifies from participation colleges that are pervasively sectarian. This is to insure that the college setting is sufficiently secular to allow for the separation of sectarian and secular functions. The second clause prohibits divinity students from participating in the program and helps to insure that the funds will be used for secular purposes.

The constitutionality of the Tuition Voucher Fund in terms of neutrality toward religion is based on the decisions in Tilton v. Richardson, Hunt v. McNair and Roemer v. Board of Public Works of Maryland. The decision in the first case established the distinction between the educational experience on the primary and secondary level and the post-secondary level. According to the Supreme Court, "the critical point is not whether some benefit accrues to a religious institution as a consequence of the legislative program but whether its principal or primary effect advances religion" (403 U.S. 672, 679 (1971)). The educational experience at the post-secondary level was defined as being primarily concerned with secular education. College students were perceived as less impressionable and less susceptible to religious doctrine.

In Hunt v. McNair, the Supreme Court evaluated Baptist College to establish whether or not the college was pervasively sectarian. Referring to Tilton v. Richardson, the justices noted that the aid could be barred to an institution if such a college or university was defined as pervasively sectarian or if the funds aided a sectarian activity at an otherwise secular setting. The Court analyzed such factors as the makeup of the trustees, the administrative structure, the religious qualifications for faculty members and the student admission policies. After this analysis, the Court concluded that the educational setting at the religiously affiliated college was not pervasively sectarian.

In Roemer v. Board of Public Works of Maryland, the Supreme Court utilized and concurred with the Circuit Court's analysis of neutrality

toward religion. The lower court had examined the private institutions participating in Maryland's program and concluded that these colleges were not pervasively sectarian. The type of permissible aid was expanded in this decision. Prior to this ruling, permissible aid had been limited to "no continuing financial relationship or dependencies, no annual audits and no governmental analysis of institution's expenditures" (426 U.S. 736, 763 (1976)). Non-restricted aid for any secular educational function was ruled permissible by this decision.

On the lower court level, state aid programs evaluated in such cases as Alabama Educational Association v. Fob James, Lendell v. Cook, Americans United for the Separation of Church and State v. Bubb, Americans United for the Separation of Church and State v. Rogers, Smith v. Board of Governors of the University of North Carolina, Americans United for the Separation of Church and State v. Blanton and Miller v. Ayers were declared to have a neutral effect upon religion.

The Tuition Voucher Fund contains no vehicle for evaluating whether or not a college is pervasively sectarian. Florida's Legislature has relied on the distinction between primary and secondary education and higher education that was established in Tilton v. Richardson and reinforced in Hunt v. McNair and Roemer v. Board of Public Works of Maryland. These decisions defined students attending religiously affiliated colleges as eligible for aid. On the lower court level, several cases have centered around the possibility of a participating college being pervasively sectarian. In Lendall v.

Cook, Americans United for the Separation of Church and State v. Bubb, Missourians for the Separation of Church and State v. Robertson, Canisius v. Nyquist, Iona College v. Nyquist, College of New Rochelle v. Nyquist and Smith v. Board of Governors of the University of North Carolina, the participation of religiously affiliated colleges is discussed. In Americans United for the Separation of Church and State v. Bubb, five religiously affiliated colleges were disqualified from participation in a tuition aid program. By not specifically evaluating the religiously affiliated colleges for pervasive sectarianism, Florida has assumed that the participating colleges are similar to those ruled acceptable in the cases mentioned above.

The failure to restrict the use of the Tuition Voucher Fund's aid is in conflict with the necessity of such a program to limit the funds to secular use. Although the decision in Roemer v. Board of Public Works of Maryland expanded permissible aid to be of a non-restricted nature, the funds are required to be used for secular functions. While the Tuition Voucher Fund's statute has restricted from participation pervasively sectarian institutions, there is no clause that requires the funds to be limited to secular activities. If participating colleges used the aid improperly, the program's funds would be used for the unconstitutional advancement of religion.

In Americans United for the Separation of Church and State v. Dunn, the court ruled as unconstitutional a program that did not properly limit the potential aid. In this 1974 decision, the Tennessee Supreme Court defined as unconstitutional a tuition assistance plan which directed the payment of tuition grants to religiously affiliated

colleges. Although the funds were applied to tuition payments, there were no restrictions on the use of the funds by the participating colleges. "Although in theory the funds were to go to students, the court treated the program as if they (sic) were given to the institution directly, since the students had no opportunity to spend the money in any way other than for tuition or fees" (O'Hara, 1982, p. 3).

The court concluded:

> Direct sovereign aid to church-related schools is not unconstitutional if the aid is exclusively restricted to the secular function of those schools, provided that the two functions can be separated. The program cannot be upheld on the basis of the distinction between aid to the secular function and aid to the sectarian function because the Tennessee statute does not contain a restriction addressing such a distinction . . . through the imposition of restrictions ensuring only secular use of the funds. . . . Moreover, the fact that the use of State funds by the school is not restricted renders the statute unconstitutional under the Establishment Clause. (384 F. Supp. 714, 721 (1979))

In Rogers v. Swanson, similar conclusions were reached by the Supreme Court of Nebraska. This court concluded that a tuition grant program which was limited to instate residents attending private colleges and not enrolled in theology or divinity degrees was unconstitutional. Besides being in variance with the Constitution of Nebraska, the court found conflict with the Establishment Clause of the First Amendment. The use of the funds had not been restricted to secular activities.

The Tuition Voucher Fund is similar to Tennessee's and Nebraska's tuition assistance programs. There is no required limitation of secular usage for the funds. The aid is institution oriented since the

money passes through the students' pockets into the coffers of the participating institutions. If the funds are used for sectarian purposes, Florida's program would unconstitutionally advance religion.

In conclusion, the Tuition Voucher Fund conflicts with the requirement of neither advancing nor inhibiting religion on two counts. First, there is no definition of and means for identifying pervasively sectarian colleges. Second, the statute does not restrict the usage of the funds to secular activities.

Secular Legislative Purpose

A legally valid program must have a secular legislative purpose and should enhance the quality of education for the state's residents. This concept was first noted in Abington School District v. Schempp where the decision combined the need for neutrality toward religion with secular legislative purpose. The Supreme Court noted:

> To withstand the strictures of the Establishment Clause, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. (374 U.S. 203, 223 (1963)).

The cases of Tilton v. Richardson, Hunt v. McNair and Roemer v. Board of Public Works of Maryland discussed whether the respective programs on the higher education level had a secular legislative purpose. The decisions in the first two cases found the financing of secular educational facilities to have a secular legislative purpose.

In Tilton v. Richardson, the Supreme Court noted that the building of educational facilities for secular activities benefited the state's residents who were in need of expanded higher educational opportunities. The Court in Hunt v. McNair noted the benefit to the state's residents since 60% of those attending Baptist College were in-state students. The decision in Roemer v. Board of Public Works of Maryland concluded that non-restricted aid to private, religiously affiliated colleges was of a secular legislative purpose. This decision lessened the importance of the need for a secular legislative purpose by emphasizing the need for finding neutrality toward religion.

The need for a secular legislative purpose is not directly addressed in the statute of the Tuition Voucher Fund. In the 1979 study of the Post-Secondary Education Commission, concepts pertinent to that of secular legislative purposes were discussed:

> The existence of a healthy independent sector is necessary for the achievement of important state goals in post-secondary education. These goals include:
> 1. To provide students, to a reasonable degree, the opportunity to attend a postsecondary institution which will help them realize their perceived educational goal . . .
> 2. To encourage the most effective cooperative utilization of all the state's postsecondary resources.
> 3. To maintain and promote diversity of postsecondary alternatives for students in Florida.
>
> (Post-Secondary Education Commission, 1979, p. 6)

The same type of logic can be found in the memorandum of law prepared by Mahoney, Hadlow and Adams and the preface to the Committee on Higher Education of the Florida House of Representatives. The committee stated:

> The cost of attending an independent college has been prohibitive to many Florida students, causing the limitation of choice. A tuition assistance plan is proposed, therefore, to provide students with fewer financial restrictions thus allowing for greater choice. (Florida, 1979, p. 1)

Although not directly stated in the specific statute, the legislative intent of the Tuition Voucher Fund is secular. The justification noted in other documents parallels the objectives noted in Tilton v. Richardson, Hunt v. McNair and Roemer v. Board of Public Works of Maryland. On the state level, similar legislative purposes can be noted in programs of state aid to private colleges in Alabama, Iowa, Maryland, Michigan, New Jersey, New York, South Carolina, Virginia and Wisconsin. In such cases as Alabama Education Association v. Fob James, Americans United for the Separation of Church and State v. Bubb, and Americans United for the Separation of Church and State v. Rogers, a similar legislative purpose as noted in Florida's program was declared constitutionally acceptable.

Excessive Governmental Entanglement

The program or statute must not foster excessive governmental entanglement between the government and religious organizations. The level of the participating institution is critical in determining if there is excessive governmental entanglement. This concept was first noted in Walz v. Tax Commissioner, a case involving tax exemptions for places of worship and Lemon v. Kurtzman, where the Supreme Court found

excessive entanglement between state government and religiously affiliated primary and secondary schools.

For religiously affiliated institutions on the higher education level, this concept has been reviewed in Tilton v. Richardson, Hunt v. McNair and Roemer v. Board of Public Works of Maryland. In the first case, the Supreme Court concluded that the difference between religiously affiliated education on the primary and secondary level and collegiate level was sufficient to not foster excessive governmental entanglement on the higher level. In this case, the colleges were defined as not being part of a religious mission, concerned with secular education and having less impressionable student bodies. In this case and Hunt v. McNair, the aid was one time for construction which limited the potential for excessive entanglement.

In Roemer v. Board of Public Works of Maryland, the Supreme Court analyzed potential excessive governmental entanglement in another manner. The majority opinion referred back to the conclusion reached in the section analyzing religious neutrality. If no colleges were found to be pervasively sectarian, there would be no excessive entanglement. The Court let stand as legal annual, continuous aid that would create administrative ties between the State of Maryland and religiously affiliated institutions of higher learning.

The Tuition Voucher Fund's statute has limited awards to "any full time undergraduate registered at a non-profit college . . . which is not a state university or pervasively sectarian institution."
By limiting the awards in this fasion, the Legislature of Florida has paralleled tuition aid programs in Alabama, Georgia, Illinois, Iowa,

Kansas, Kentucky, Maine, Michigan, Missouri, New Jersey, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Virginia, and Wisconsin. All of the states have programs that grant funds to students attending private, religiously affiliated colleges. On the lower court level, student aid of this nature has been declared valid in Lendell v. Cook, Americans United for the Separation of Church and State v. Bubb, and Americans United for the Separation of Church and State v. Rogers. In the latter case, the Missouri Supreme Court summed up the excessive entanglement question for a program similar to Florida:

> Under the statute now challenged, institutions involved (with the state) are limited to verification that the student is actually in attendance at the particular school and repayment to the board of any refund due upon the transfer or withdrawal of a student. The latter would appear to be less involved than the reporting under the statute of Maryland in the Roemer case . . . Excessive entanglement does not arise necessarily because the challenged plan calls for annual legislative appropriations. (683 S.W.2d 711, 718 (1977))

In conclusion, the Tuition Voucher Fund's language includes the necessary limitations of non-participation of pervasively sectarian schools or students of divinity or theology to insure no excessive entanglement. The type of aid and administrative regulations are no more entangling than that in Roemer v. Board of Public Works of Maryland.

Compliance with State Constitution Regulations

The program or statute must comply with state constitutional regulations. As previously noted, several states have regulations that are similar to those in the U.S. Constitution. In some cases, the constitutional constraints on the state level are more restrictive than those on the federal level. In Alabama, Alaska, Nebraska, Washington and Wisconsin, state aid programs were declared ineligible on the lower court level due to conflicts with state constitutions. In South Carolina, Texas and Virginia, programs initially were declared unconstitutional. Due to constitutional amendments or changes in the statutes, these states now have aid programs that are legal on the federal and state level.

The 1968 Constitution of Florida has one clause that is directed toward state aid to sectarian institutions. Article IX, Section 6 states:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution.

The constitutions of Alaska, Nebraska, South Carolina and Wisconsin contain similar clauses that have caused aid programs to be declared invalid. Article VII, Section 1 of the Constitution of Alaska states:

> The legislature shall by general law establish and maintain a system of public schools open to all children of the state, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution. (599 P.2d 127, 128 (1979))

In Sheldon Jackson College v. State of Alaska, the State's Supreme Court concluded that Alaska's tuition grant program "provided direct benefits to private educational institutions and thus violated Article VII, Section 1" (599 P.2d 127, 128 (1979)). Prior to this ruling, the voters of Alaska had rejected a constitutional amendment that would have allowed such aid. Although the program channeled funds through the intermediary of the student population, the Court viewed the aid as directly benefitting private colleges and as a non-neutral incentive to attend private colleges.

Article III, Section 18 of the Constitution of Nebraska "prohibits the granting to any corporation, association or individual any special or exclusive privileges, community or franchises whatever" (219 N.W.2d 728, 733 (1974)). In Rogers v. Swanson, the Supreme Court of Nebraska ruled that the tuition aid program violated the constitution's provision since both the class of students eligible and the class of institutions were restricted and accorded special privileges. The Court also found conflict with Article VII, Section 11 which prohibited appropriations being made directly to private colleges.

Article XI, Section 9 of South Carolina's Constitution states:

> The property or credit of the State of South Carolina . . . or any public money from whatever source derived, shall not, by gift, donation, loan, contract, appropriation,

> or otherwise, be used, directly or indirectly, in aid or maintenance of any college, school . . . which is wholly or in part under the direction or control of any church or any religious or sectarian denomination, society or organization. (179 S.E.2d 907, 908 (1971))

In Hartness v. Paterson, the Supreme Court of South Carolina concluded that the program benefited religious institutions and was in violation of the constitution.

Article I, Section 18 of the Wisconsin Constitution states: "Nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries" (198 N.W.2d 650, 659 (1972)). In State ex. rel Warren v. Nusbaum, the Wisconsin Supreme Court ruled on the validity of annual aid to a dental college for instate students. The college was part of Marquette College, a religiously affiliated institution. Since the payment was not restricted to only dental school functions, the court ruled that the aid was in violation with Article I, Section 18 of the State's Constitution.

In the Tuition Voucher Fund's statute, all sectarian or religiously affiliated institutions have not been ruled ineligible. Only pervasively sectarian colleges have been disqualified from participating in the program. Barry College, Eckerd College, Florida Memorial College, Florida Southern College, St. Leo's College and Stetson College are religiously affiliated colleges whose students are eligible to receive tuition voucher funds.

Similar to the situation of Sheldon Jackson College v. State of Alaska in which the State Constitution prohibited aid to all private

colleges, the Tuition Voucher Fund is in conflict with Article IX, Section 6 of Florida's Constitution. In this program, state revenue is used "directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institutions" (Florida, 1968). In contrast to Rogers v. Swanson in which Nebraska's Constitution prohibits direct aid to private colleges, Florida's Constitution disallows direct or indirect aid to any sectarian institution. A plaintiff's case would not need to demonstrate direct aid to participating colleges in a program which funds are earmarked for students. Only indirect aid for sectarian, not pervasively sectarian, colleges must be shown. While the educational experience may be sufficiently secular, Article IX, Section 6 of the Constitution of Florida has prohibited direct or indirect aid to such institutions.

Non-Discrimination Clause

The program or statute must include a non-discrimination clause which insures that students attending the participating colleges cannot be discriminated against because of race, religion or creed. As previously discussed, several state acts contain non-discrimination clauses as an outgrowth of the Civil Rights legislation of the 1960's. Clauses of this nature have been attached to the legislation in Alabama, Illinois, Pennsylvania and Texas.

The Tuition Voucher Fund statute does not contain a non-discrimination clause. Since the need for this type of clause has not been

discussed in any of the related cases, the lack of such a statement would not result in the unconstitutionality of a tuition voucher program.

Accreditation

The program or statute must require that the participating institutions be accredited by regional accrediting or state agencies. Quality control is enhanced by such accreditation. In developing state aid programs for private colleges, Alabama, Arkansas, Kansas, Kentucky, Minnesota, Missouri, New Jersey, North Carolina, North Dakota, South Dakota, Tennessee and Virginia have incorporated such requirements.

The Tuition Voucher Fund addressed the need for this clause. Section 2 of the statute states:

> The department shall issue from the fund a tuition voucher to any full-time undergraduate student registered at a non-profit college or university which is located in and chartered by the state, which is accredited by an agency holding membership in the Council of Post-secondary Accreditation.

The Tuition Voucher Fund has complied with the requirements of this guideline. Each participating college is required to be chartered by the State of Florida and be accredited by an agency holding membership in the Council of Post-secondary Accreditation.

Conclusion

The Tuition Voucher Fund of Florida is in agreement with three of the six suggested guidelines. There are no conflicts with the requirements for a secular legislative purpose, excessive governmental entanglement with religion or the need for proper accreditation by participating colleges.

The program is in conflict with the need for a neutral effect upon religion, which is one part of the three-tiered test. The statute does not limit to secular usage the funds that are allocated to the participating institutions. Although the aid is credited to the students' tuition bills, the funds are given directly to the institutions without restriction. The Tuition Voucher Fund lacks a means for evaluating what constitutes pervasive sectarianism. Institutions that are pervasively sectarian could be participating in the program. A legal suit based on the issue of non-limitation of aid usage could result in the program being declared unconstitutional.

The Tuition Voucher Fund does not contain a non-discrimination clause. Although the absence of such a clause does not create any apparent legal conflict, there is a possibility of improper behavior by a participating college. The disqualification from participation of pervasively sectarian institutions eliminates some of the possibilities of discrimination. The lack of an across the board non-discrimination clause does leave the avenue open for such behavior.

The statute of the Tuition Voucher Fund is in conflict with the suggested guideline of compliance with state constitutional regulations. Since Article IX, Section 6 prohibits direct or indirect aid to

sectarian institutions, the statute is in violation of Florida's Constitution. A case brought into the court system based on this conflict could result in the Tuition Voucher Program being ruled unconstitutional.

CHAPTER SEVEN
SUMMARY AND CONCLUSIONS

Summary

The intention of this research was to review the federal and state legal precedents for governmental aid to private colleges, review state-level programs, develop guidelines for determining the legality of governmental aid programs to private colleges, summarize Florida's Tuition Voucher Fund and illustrate the usefulness of these guidelines by applying them to the Tuition Voucher Fund.

On the Supreme Court level, the development of several concepts is traced. First, the distinction between private, sectarian education on the primary and secondary level and the higher education level is noted. Almost all aid is defined as pervasively sectarian on the primary and secondary level. Second, the development of the three-tiered test by the Supreme Court is traced. On the higher education level, governmental aid to sectarian institutions is permissible if the program neither advances nor inhibits religion, has a secular legislative purpose, and does not create excessive governmental entanglement. Third, the expansion of types of permissible aid on this level is noted. After Roemer v. Board of Public Works of Maryland, one-time governmental aid has been expanded so that unrestricted aid for secular education is now permissible.

On the lower court level, the application of the Supreme Court restrictions is reviewed. Two types of cases involving institutions of higher education are noted. First, a number of cases involve state higher education facilities authorities. These cases question the legality of state guaranteed bonds for the building of secular education facilities at private, sectarian colleges. In the highest court's decision of Hunt v. McNair, this type of aid is defined as legal and ceased to be an issue on the state judicial level. Second, numerous cases involve direct state aid to private colleges or their student populations. These cases use the three-tiered test as this concept is developed by the Supreme Court. Most of the cases decide whether a specific program contains constitutionally valid aid. After Roemer v. Board of Public Works of Maryland broadened what is permissible aid, the lower level courts have validated all aid programs for sectarian education. Those programs that conflict with state constitutional regulations have been ruled invalid.

The types and extent of state aid programs for private colleges or their student bodies are reviewed. Two types of programs are noted: those that aid students directly and those that aid the participating institutions. In both cases, the funds must be utilized for secular education in non-pervasively sectarian settings. State aid for which students attending private or public colleges are eligible is noted. The level of this aid affects the students attending private colleges. If the award is at a sufficient level, students attending private colleges can receive funds in excess of those attending public institutions.

Six guidelines are developed. These guidelines are based on the Supreme Court decisions, lower level court rulings and the actual programs of the various states. The guidelines are: Neutral effect upon religion; secular legislative purposes; no excessive governmental entanglement; compliance with state governmental regulations; accreditation of participating colleges and inclusion of a non-discrimination clause. All six guidelines apply to potential aid to private, sectarian colleges while the later three guidelines are for private, secular institutions.

Florida's Tuition Voucher Fund is reviewed. The legal analysis of the potential statute by Hadlow, Mahoney, and Adams is discussed. Five of the six guidelines are discussed by the memorandums of law or mentioned in the statute. The non-discrimination clause is not included in the Tuition Voucher Fund's statute. The Tuition Voucher Fund conflicts with the need to have a neutral effect upon religion and comply with state governmental regulations guidelines.

In addition to the development of the guidelines, this research has gathered the existing case law, on the federal and state level, relative to governmental aid to private colleges and universities. This study also summarizes the current status of statutory law in the numerous states where there is governmental aid to private colleges and universities.

Conclusion

The six guidelines have proved to be useful in analyzing the legality of state aid to private institutions of higher education. This fact was specifically demonstrated by applying the guidelines to Florida's Tuition Voucher Fund. If the developed guidelines had been used by Florida's legislature, the state's Constitution would have had to be amended to allow direct or indirect aid to sectarian institutions. This program also would have had to restrict use of the funds to secular activities at participating colleges. The illustration of the usefulness of the guidelines when applied to the Tuition Voucher Fund has demonstrated the possibility of a wider applicability. If the guidelines are used to develop new programs in other states, the legislation enacted should result in constitutionally valid and appropriate statutes.

The programs of other states should be analyzed in terms of these guidelines. The states that have not developed legislation in this area can review this and other related documents to determine the possibility of legislation for their constituencies. The process which was used to develop these guidelines can be adopted for other areas of governmental support for education. Similar guidelines can be developed for these parallel areas of governmental involvement.

APPENDIX

APPENDIX I
STATE TUITION VOUCHER STATUTE

240.401 State tuition vouchers.--

(1) There is created the State Tuition Voucher Fund to be administered by the Department of Education. The department shall adopt rules for the administration of such fund.

(2) The department shall issue from the fund a tuition voucher to any full-time undergraduate student registered at a nonprofit college or university which is located in and chartered by the state, which is accredited by an agency holding membership in the Council on Postsecondary Accreditation, which grants baccalaureate degrees and whose credits are acceptable without qualification for transfer to state universities, and which is not a state university or pervasively sectarian institution.

(3) A person is eligible to receive such tuition voucher if:

(a) He is a graduate of a Florida high school;

(b) He has resided continuously in the state for the 2 years immediately preceding the award of the tuition voucher and is not a resident of another state;

(c) He is registered:

1. As a freshman after July 31, 1979;

2. As a freshman or sophomore after July 31, 1980;

3. As a freshman, sophomore, junior, or senior after July 31, 1981; or

4. As a freshman, sophomore, junior, or senior after July 31, 1982; and

(d) 1. He is enrolled as a full-time undergraduate student at an eligible college or university;

2. He is not enrolled in a program of study leading to a degree in theology or divinity; and

3. He is making satisfactory academic progress as defined by the college or university in which he is enrolled.

(4) (a) The amount of the tuition voucher issued to a full-time student shall be no more than $1,000 per academic year or as specified in the General Appropriations Act. The tuition voucher shall be paid on a prorated basis at the beginning of each quarter, semester, or term. The department shall make such payments to the college or university in which the student is enrolled for credit to the student's account for payment of tuition and fees. Students shall not be eligible to receive the award for more than 4 years, 8 semesters, or 12 quarters.

(b) If the combined amount of the tuition voucher issued pursuant to this act and all other scholarships and grants for tuition or fees exceeds the amount charged to the student for tuition and fees, the department shall reduce the tuition voucher issued pursuant to this act by an amount equal to such excess.

APPENDIX II
FTVF REQUISITION FOR PAYMENT

STATE OF FLORIDA
DEPARTMENT OF EDUCATION
TALLAHASSEE, FLORIDA
RALPH D. TURLINGTON, COMMISSIONER
AN EQUAL OPPORTUNITY EMPLOYER

FLORIDA TUITION VOUCHER FUNDS

REQUISITION FOR PAYMENT

INSTITUTION: _____ DATE: _____

Requisition is hereby made in the amount of $_____ covering payment of Florida Tuition Voucher Funds for the _____ term, 19 __.

I certify that the students listed on the attached have registered as full-time students at this institution for the registration period indicated and meet all requirements set forth in the statute creating the Tuition Voucher Fund and the administrative rules.

_____
Chief Executive Officer

Instructions for Submitting the Requisition for Payment
for the Florida Tuition Voucher Fund

To expedite the processing of Florida Tuition Voucher Funds, submit alphabetic rosters of eligible students, containing the following information; attach these rosters to this form. Use the same format below (institutions having automated registration procedures may attach a computer roster to the appropriate Requisition for Payment form, provided the format below is used). Send one copy to the Florida Student Financial Assistance Commission and retain one copy for your file.

SAMPLE FORMAT

INSTITUTION'S NAME: TERM: YEAR:

STUDENT'S SOCIAL SECURITY NUMBER	STUDENT'S NAME	TUITION VOUCHER AMOUNT
000-00-000	Doe, John	$750.00

APPENDIX III
APPLICATION AND INSTRUCTIONS
FLORIDA TUITION VOUCHER FUND (FTVF)

Read eligibility requirements on the reverse side
TYPE OR PRINT NEATLY IN INK.

Submit completed application form to authorized educational institution official.

1. Last Name First Name Middle Name

Maiden Name (if married female) 2. Social Security Number 3. Birthdate (Use figures) Month Day Year

4. Name and Address of Florida High School From Which you Graduated

City High School Name

5. Year of High School Graduation 19___

6. As of the eleventh day of classes for the first school term you are applying for the FTVF (item 11), will you have resided in the state of Florida for at least twenty-four (24) continuous months preceding the award of a tuition voucher, exclusive of temporary absence?

____Yes ____No

7. Beginning date of your current residency in Florida

Month Year

8. Permanent Address of Parents or Guardian Street City or Town State Zip Code

9. During the initial school term applied for in item 11, will you be classified as a ("X" one):

____ Freshman ____Sophomore _____Junior _____Senior

10. STUDENT CERTIFICATION:

I hereby swear (or affirm) that the information contained on this application is true, complete, and correct, and that, to the best of my knowledge and belief, I am eligible for the Florida Tuition Voucher Fund as defined under Florida laws and under the administrative rules of the State Board of Education, which govern the Florida Tuition Voucher Fund Program.

Signature of Applicant Date

Educational Institution Use Only

11. School Term _____ year ____

	Fall Qt/Sem	Winter Qt/Sem	Spring Qt/Sem	Summer Qt/Sem
a. Hours Enrolled _____				
b. Total Tuition and Fees	$	$	$	$
c. Dollar Amount of Scholarship and Grants Designated for Tuition and Fees	$	$	$	$
d. Substract (c) from (b) above. The remainder is the amount of the tuition voucher, not to exceed $250 per quarter, $375 per semester, or $750 per academic year	$	$	$	$

12. SCHOOL CERTIFICATION

I hereby certify that the information contained in this statement is true, complete, and correct to the best of my knowledge and belief and according to the records of this institution. I also hereby certify that I have properly evaluated and completed the appropriate section (item 11) of this application regarding residency, minimum academic load, and student classification for each school term applied for by the student applicant. Based upon information provided by the student applicant, I attest to the eligibility or continued eligibility of the student applicant in accordance with Florida laws and administrative rules governing the Florida Tuition Voucher Fund, as administered by the Florida Student Financial Assistance Commission.

_____ _____

Educational Institution Name | Signature of Authorized Official

_____ _____

Date | Title of Authorized Official

To be retained with the records of the educational institution.
DO NOT SEND TO THE FLORIDA STUDENT FINANCIAL ASSISTANCE COMMISSION!

LEGAL CASES CITED

Abington School District v. Schempp, 374 U.S. 203 (1963).

Alabama Education Association v. Fob James, 373 So.2d 1076 (1979).

Americans United for the Separation of Church and State v. Blanton, 433 F. Supp. 97 (1977).

Americans United for the Separation of Church and State v. Bubb, 379 F. Supp. 892 (1974).

Americans United for the Separation of Church and State v. Dunn, 384 F. Supp. 714 (1974).

Americans United for the Separation of Church and State v. Rogers, 538 S.W.2d 711 (1977).

Board of Education v. Allen, 392 U.S. 236 (1968).

California Educational Facilities Authority v. Priest, 526 P.2d 513 (1974).

Canisius v. Nyquist, 320 N.Y.S.2d 652 (1971).

Clayton v. Kervick, 244 A.2d 281 (1968).

Clayton v. Kervick, 285 A.2d 11 (1971).

College of New Rochelle v. Nyquist, 326 N.Y.S.2d 765 (1971).

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

Creole v. Illinois Educational Facilities Authority, 268 N.E.2d 299 (1972).

Durham v. McLeod, 102 S.E.2d 202 (1972).

Everson v. Board of Education, 330 U.S. 1 (1947).

Hartness v. Paterson, 179 S.E.2d 907 (1971).

Horace Mann League v. Board of Public Works of the State of Maryland, 200 A.2d 51 (1966).

Hunt v. McNair, 413 U.S. 734 (1973).

Iowa College v. Nyquist, 316 N.Y.S.2d 139 (1971)

Johnson v. Presbyterian Homes of the Synod of Florida, Inc., 239 So.2d 256 (1970).

Lemon v. Kurtzman, 403 U.S. 612 (1971).

Lendall v. Cook, 432 F. Supp. 971 (1977).

Levitt v. Committee for Public Education, 413 U.S. 472 (1973).

Miller v. Ayres, 191 S.E.2d 261 (1972).

Miller v. Ayres, 198 S.E.2d 634 (1973).

Missourians for the Separation of Church and State v. Robertson, 592 S.W.2d 825 (1979).

Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 301 (1971).

Opinion of the Justices, 280 So.2d 547 (1973).

Overman v. State Board of Control, 62 So.2d 696 (1952).

Roemer v. Board of Public Works of the State of Maryland, 426 U.S. 736 (1976).

Rogers v. Swanson, 219 N.W.2d 726 (1974).

Sheldon Jackson College v. State of Alaska, 599 P.2d 127 (1979).

Sloan v. Lemon, 413 U.S. 825 (1973).

Smith v. Board of Governors of the University of North Carolina, 429 F. Supp. 871 (1977).

State ex rel. Warren v. Nusbaum, 198 N.W.2d 650 (1972).

Tilton v. Finch, 312 F. Supp. 1191 (1970).

Tilton v. Richardson, 403 U.S. 672 (1971).

Walz v. Tax Commission, 397 U.S. 664 (1970).

Weiss v. O'Brien, 509 P.2d 973 (1973).

REFERENCES

Alabama Commission on Higher Education. Information concerning Alabama student assistance programs. Montgomery, Alabama: Commission on Higher Education, 1982.

Alabama, Student Grant Program. Alabama student grant program, 3rd annual report, 1980-81 academic year. Montgomery, Alabama: Student Grant Program, 1981.

Albrecht, W.E., & Shaw, W.I. Establishment clause and governmental aid to colleges. St. Louis University Law Journal, 1967, 11(3), 464-473.

Benezet, L.T. Private higher education: What price diversity? Educational Record, 1977, 58(2), 201-217.

Blanton, H. The entanglement theory: Its development and some implications for future aid to church-related higher education. Journal of Law & Education, 1978, 7(3), 359-422.

Bowen, H.R. Cost differences: The amazing disparity among institutions of higher education costs per student. Change, 1981, 13(1), 21-27.

Bowen, H.R., & Minter, J. Private higher education: Third annual report of financial and educational trends in the trends in the private sector of American higher education. Washington, D.C.: Association of American Colleges, 1977.

Breneman, D.W., & Finn, C.E. An uncertain future. In D.W. Breneman & C.E. Finn (Eds.), Public policy and private higher education. Washington, D.C.: Brookings Institute, 1978, 1-61.

Carnegie Council on Policy Studies in Higher Education. The states and private higher education. San Francisco: Jossey-Bass, 1977.

Church, state and education--The Supreme Court and its critics. Journal of Law & Education, 1973, 2(4), 535-91.

Florida. Constitution, 1968.

Florida, House of Representatives. Tuition assistance program memorandum. Tallahassee, Florida: House of Representatives, 1979a.

Florida, Post-secondary Education Commission. State policy and post-secondary education: The relationship of the independent and public sectors. Tallahassee, Florida: Post-secondary Education Commission, 1979b.

Florida. Statutes, 1979c.

Florida, Department of Education. Florida statutes and administrative rules relating to student financial assistance programs. Tallahassee, Florida: Department of Education, 1982.

Folger, J. Prospects for higher education finance in the next decade. Journal of Educational Finance, 1977, 3(3), 187-197.

Ford, L. Institutional aid. Journal of Law & Education, 1972, 1(4), 541-86.

Ford, W. The constitutional implications of federal aid to higher education. Journal of Law & Education, 1972, 1(4), 513-40.

Georgia, Student Finance Authority. Georgia student financial aid handbook for the 1982-83 school year. Tucker, Georgia: Student Finance Authority, 1982.

Greenewalt, K. Constitutional limits on aid to sectarian universities. Journal of College and University Law, 1977, 4(2), 177-86.

Howard, A.E.D. State aid to private higher education. Charlotteville, Virginia: Michie-Bobbs, 1976.

Howe, H. What future for the private college? Change, 1979, 11(4), 28-31.

Independent Colleges and Universities of Florida. Newsletter, 1978, 15(1), 1-7.

Kauper, P.G. The Supreme Court and the Establishment Clause. Case Western Reserve Law Review, 1974, 25(1), 120-29.

Kentucky, Council on Higher Education. Report on public/private cooperation in Kentucky Higher Education, 1977-78. Lexington, Kentucky: Council on Higher Education, 1978.

Lewis, R.J. The future of the independent sector of higher education--An economic appraisal. College and University, 1980, 56(1), 66-75.

McFarlane, W.H. State aid for Virginia's private colleges? Journal of Law and Education, 1973, 2(4), 593-611.

McPherson, M.S. The demand for higher education. In D.W. Breneman & C.E. Finn (Eds.), Public policy and private higher education. Washington, D.C.: Brookings Institute, 1978, 63-142.

Mahoney, Hadlow & Adams. Memorandum of law. Tallahassee, Florida: Mahoney, Hadlow and Adams, April 11, 1979a.

Mahoney, Hadlow & Adams. Memorandum of law. Tallahassee, Florida: Mahoney, Hadlow and Adams, April 30, 1979b.

Maryland, State Board for Higher Education. 1980-82 guide to post-secondary education in Maryland. Annapolis, Maryland: State Board for Higher Education, 1981.

Michigan, Student Financial Assistance Services. Annual report, 1978-79. Lansing, Michigan: Student Financial Assistance Services, 1979.

Michigan, Higher Education Assistance Authority. Annual report, 1980-81. Lansing, Michigan: Higher Education Assistance Authority, 1981.

Minnesota. Statutes, 1975.

Missouri, Department of Higher Education. Guaranteed student loan program. Jefferson City, Missouri: Department of Higher Education, 1981a.

Missouri, Department of Higher Education. Missouri student grant program. Jefferson City, Missouri: Department of Higher Education, 1981b.

Nelson, S.C. Financial trends and issues. In D.W. Breneman & C.E. Finn (Eds.), Public policy and private higher education. Washington, D.C.: Brookings Institute, 1978, 63-142.

New Jersey. Statutes, 1978.

New York, State Education Department. New York State Bundy aid program, 1969-1979. Albany, New York: State Education Department, 1979.

New York, Cultural Education Center. Post-secondary research, information systems and institutional aid. Albany, New York: Cultural Education Center, 1980.

New York, Higher Education Services Corporation. Annual report, 1980-81. Albany, New York: Higher Education Services Corporation, 1981.

New York, Higher Education Services Corporation. A review of government sponsored financial aid programs in New York State. Albany, New York: Higher Education Services Corporation, 1982.

North Dakota, Laws, 1981.

O'Hara, J.U. The constitutionality of higher education tuition assistance programs. West's Education Law Reporter, 1982, (5), 1-7.

Olliver, J. The legal status of state aid for nonpublic colleges and universities in the U.S. Tallahassee, Florida: Florida State University, 1975.

Olliver, J. Report on state legislative activity. Tallahassee, Florida: Independent Colleges and Universities of Florida, 1979.

Oregon. Statutes, 1974.

Oregon, State Scholarship Commission. Annual report, 1978-79. Eugene, Oregon: State Scholarship Commission, 1979.

Oregon, Department of Education. Summary of 1979-80 purchase of educational services from independent colleges. Salem, Oregon: Department of Education, 1980a.

Oregon, Scholarship Commission. Administrative rules. Salem, Oregon: Scholarship Commission, 1980b.

Pennsylvania, Higher Education Assistance Authority. Commonwealth act creating institutional grants. Harrisburg, Pennsylvania: Higher Education Assistance Authority, 1974.

Pennsylvania, Higher Education Assistance Authority. Keys to students aid for Pennsylvanians. Harrisburg, Pennsylvania: Higher Education Assistance Authority, 1981.

Private colleges, state aid and the establishment clause. Duke Law Journal, 1975, 1975(4), 976-98.

Sauser, R.W. Constitutional law--First Amendment--State aid to nonpublic sectarian colleges. Tennessee Law Review, 1977, 44(2), 377-388.

Schauf, L.E. Constitutionality of the proposed Kansas tuition grant program. Washburn Law Journal, 1971, 10(3), 431-49.

Schubert, R.C. State action and the private university. Rutgers Law Review, 1970, 24(2), 323-52.

Smith, M.R. Emerging consequences of financing private college with public money. Valparaiso University Law Review, 1975, 9(3), 561-610.

South Carolina, Tuition Grants Agency. You and South Carolina's tuition grants program. Columbia, South Carolina: Tuition Grants Agency, 1981.

South Dakota, Department of Education and Cultural Affairs. State student grant programs. Pierre, South Dakota: Department of Education and Cultural Affairs, 1982.

Texas, College and University System Coordinating Board. Financial aid for Texas students. Austin, Texas: College and University System Coordinating Board, 1979.

Thal, S. First Amendment limitations on accrediting agencies in determining eligibility for federal aid to education. Journal of Law & Education, 1979, 8(3), 327-35.

Underwood, J.L. Permissible entanglement under the establishment clause. Emory Law Journal, 1976, 25(1), 17-62.

United States. Constitution.

Virginia. Code of Laws, 1975.

Virginia, State Council of Higher Education. An introduction to financial aid opportunities in Virginia. Richmond, Virginia: State Council of Higher Education, 1981.

Virginia, State Council for Higher Education. Tuition assistance grant program application, 1982-83. Richmond, Virginia: State Council for Higher Education, 1982.

Webber, T. Constitutional law--Establishment Clause--Supreme Court upholds direct noncategorical grants to church-affiliated colleges. Fordham Law Review, 1977, 45(4), 979-92.

Wisconsin, University of Wisconsin. Discussion paper--Financial aid programs serving UW system students. Madison, Wisconsin: University of Wisconsin, Board of Regents, 1981.

BIOGRAPHICAL SKETCH

The author was born in Brooklyn, New York, on March 27, 1947. He graduated from Andrew Jackson High School in St. Albans, Queens, although too much of this period was spent playing basketball and running track. During most of the next eight years, the following colleges were attended: Cornell University, State University of New York at Albany, New York University, State College of New York at New Paltz and Queens College of the City University of New York. This attendance resulted in a B.A. in history (SUNY at Albany), M.A. in history (New York University) and a M.L.S. (Queens College).

After teaching for two years at the Warwick State School for Boys, Warwick, New York, the author was employed as a librarian at the Inter-American University in Bayamon, Puerto Rico, and as acquistions librarian in the University of Florida Library System. He is presently employed as Technical Services Librarian in the Health Center Library and is still involved in running, having served as President of the Florida Track Club for four years.

The author is married to the former Helene Toby Zolkower of Yonkers, New York, who is employed as a teacher of physical education at Waldo Community School. There is one offspring, Jamie Bianca, who is almost three years old and wants to be a ballerina.

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

James L. Wattenbarger, Chairman
Professor of Educational Administration
and Supervision

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

S. Kern Alexander
Professor of Educational Administration
and Supervision

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

William D. Hedges
Professor of Instructional Leadership
and Support

This dissertation was submitted to the Graduate Faculty of the Department of Educational Administration and Supervision in the College of Education and to the Graduate Council, and was accepted as partial fulfillment of the requirements for the degree of Doctor of Philosophy.

April 1983

Dean for Graduate Studies and Research